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NO. 19509

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOSEPH CLYDE AMSLER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court
for the Southern District of California
Central Division

APPELLANT'S OPENING BRIEF

MORRIS LAVINE
215 West 7th Street
Los Angeles, California 90014

Attorney for Appellant

TOPICAL INDEX

APPENDICES

TABLE OF AUTHORITIES CITED

STATUTES

RULES

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JURISDICTION

Jurisdiction is conferred by Title 28, Section 1291, U.S. Codes, and by the Rules on Appeal of the United States Court of Appeals.

The judgment of conviction, dated March 7, 1964, was entered on March 13, 1964 and notice of appeal was duly and regularly given. An order allowing the defendant to proceed in forma pauperis, having previously been made in the trial court, was duly and regularly continued on appeal.

The defendant had repeated trouble in getting a com-

pleted record as the court reporter who reported part of the case came from Portland, Oregon, and parts of the proceedings were omitted. Demands were made to supplement the record to complete the incomplete record. Extensions of time were required to be had and were granted by the Court of Appeals to and including December 24, 1965. This appeal is being filed within the time so extended and upon a record finally completed after investigation of the incomplete record as filed in the Court of Appeals.

STATUTES, CONSTITUTIONAL PROVISIONS, RULES AND ORDERS INVOLVED

The following statutes, constitutional provisions, rules and orders involved are set forth in full in Appendix A hereto: Title 18, Sections 371, 875(a), 1201, 1202 and 3432, U.S. Codes; the Fourth, Fifth and Sixth Amendments to the United States Constitution; Article 3, Section 2, United States Constitution; Federal Rules of Criminal Procedure, Rules 5, 17(a), 17(b) and 17(c); and Local Rules and Orders of the United States District Court for the Southern District of California, Central Division.

PRELIMINARY STATEMENT

In order that we may fully understand the relationship of the parties in this unusual case, we set forth the cast of principal characters involved herein.

Frank Sinatra, Jr., age 19, an entertainer at Harrah's Lodge on the California side at Lake Tahoe, earning $100 a week and the last name on the marquee; occupied Room 417,

case, who selected a jury according to the "Arizona System" and tried it by Oregon procedure and standards.

Judge William G. East's entourage from Oregon, unsworn in California; his Oregon clerk, Roger B. Buchanan; his Oregon bailiff; and Joseph S. McCloskey, his Oregon court reporter, all brought to Los Angeles and held in Los Angeles at government expense for this trial.

Mrs. Betty Graydon, U.S. Commissioner at San Diego.

John Foss, a singer and friend of Frank Sinatra, Jr., a trumpet player, in the Tommy Dorsey bank with Frank Sinatra, Jr. and in Room 417 with Frank Sinatra, Jr. at Harrah's Lodge at Lake Tahoe.

Ronald Bray, a friend of Barry Keenan, who was offered $10,000 by Keenan to join in "the operation". (R. 2019)

Dean Torrance, a member of the Dean and Jan team of singers, who denied any knowledge of the participation but who later admitted that he participated, had committed perjury in his earlier testimony but was never prosecuted.

An unknown "backer" of the "project". (R. 2043)

FBI agents.

Deputy Sheriffs.

Police officers in and around roadblocks and elsewhere.

U.S. Marshals in and around the courtroom.

Nancy Sinatra, Frank Sinatra, Jr.'s mother (at her home at 700 Nimes Road).

Milton Rudin, attorney for Frank Sinatra, Sr.

Alfred Hart, president of the bank, who arranged for

the withdrawal of $240,000 in government notes, nearly all of which was returned, and destroyed after its use.

$239,985, allegedly in paper currency, destroyed and never actually produced in court.

Jurors and prospective jurors picked by the "Arizona System" in the Southern District of California by an Oregon judge and an unsworn Oregon court.

At least 50 television, radio and newsmen at the Sinatra home.

Newspaper reporters, radio and television men with cameras and television equipment and newspaper cameramen, barred from the second floor of the Federal Building by court order.

Francis C. Whelan, U.S. Attorney, by Thomas R. Sheridan, Assistant U.S. Attorney in charge of the prosecution of the case.

George Murphy, Assistant U.S. Attorney in the prosecution of the case.

George A. Forde and Morris Lavine, attorneys for the defendant Joseph Clyde Amsler

Gladys Towles Root, attorney for defendant John William Irwin.

Charles L. Crouch, Jr., attorney for defendant Barry Worthington Keenan.

Other participants and supernumeraries.

The action in this case took place at the following locations:

Harrah's Lodge, at Lake Tahoe.

The Arizona State Fair.

A house at 8143 Mason Avenue, Canoga Park, California.

The Mapes Hotel, in Reno, Nevada.

Gasoline stations at Carson City, Nevada.

A telephone booth at Reno, Nevada, and another at Carson City, Nevada.

The home of Nancy Sinatra, 700 Nimes Road, Bel Air, California.

The FBI office in San Diego, California.

The U.S. Commissioner's office, San Diego, California.

The United States District Court, Southern District of California, Central Division, Los Angeles, California.

The time of the events herein was generally from December 8 to December 16, 1965.

STATEMENT OF FACTS

On January 2, 1963, defendant Joseph Clyde Amsler was indicted in connection with six counts of alleged kidnaping of Frank Sinatra, Jr. from South Lodge, Stateline, California, and taking him to the area of Southern California, allegedly for the purpose of ransom and reward.

Following the return of the indictment, defendant Joseph Clyde Amsler, along with his co-defendants, pursuant to Local Rules of the United States District Court, Southern District of California, Central Division, was arraigned before the Honorable Albert Lee Stephens, Jr., the judge presiding in the criminal court at the time.

Thereafter, on the date on which he was to be arraigned and proceedings heard in connection with the assignment of the case, a great irregularity occurred in that Judge William G. East, a District Judge from the United States District Court, Portland, Oregon, was assigned to the case and brought with him his entire entourage, consisting of his secretary, his law clerk, his court reporter and the clerk of his court, none of whom were sworn to act in the Southern District of California.

On the date the case was to proceed before local Southern District Judge Albert Lee Stephens, Jr., the case was transferred, without his consent, to Judge William G. East. Thereupon, objections were made to his presiding at the trial on the ground that the Constitution of the United States required that a criminal case be tried in the State and jurisdiction where the case originates or where the crime occurred and that the trial judge is a part of the trial court and procedure which must be local and not from another State and District.

All these challenges to the jurisdiction of the Court were overruled. (See proceedings of January 20, 1964, p. 2, et seq., in transcript entitled "Motion to Produce".)

The court said he was assigned to the Los Angeles District by the designation by the Chief Judge under Section 292, Subsection (d) of Title 28. However, this Section might well apply to the handling of civil cases but flies squarely in conflict with the provisions of Article 2,

Section 3 of the Constitution of the United States and also with Local Rules as to how criminal cases should be assigned.

Thereafter, Judge East continued, over objections, to hear matters and try the case.

He proceeded under what he called the "Arizona System" to have the jury selected, a system quite foreign to that practiced in California and quite unused by local counsel. On the second day of the trial procedure, counsel objected and called attention to the fact that the judge's own clerk, whom he had brought, was not sworn to administer oaths and that he was unauthorized to administer any oaths to any prospective jurors or any jurors. By that time the court had already selected a panel of jurors and had excused a number of jurors who had been questioned but who had not been sworn by a clerk authorized to administer the oath and none of the jurors in the box had been sworn by a clerk of the United States District Court for the Southern District of California authorized to administer any oaths.

Thereupon, Judge East took it upon himself to administer an oath to the jurors in the box who had remained and to continue the trial of the case with these jurors, although he, himself, was not even authorized by local law to administer any oaths.

Thereupon, all of his proceedings and procedure were challenged as null and void and as not authorized. All of these objections were overruled. (See transcript of Janu-

ary 20, 1964, pp. 1-13)

Defendant Amsler, along with others, made motions to suppress all the evidence and all the statements taken from the accused on the grounds that they were taken prior to arraignment and that they were without the benefit of counsel. All these motions were denied and the court proceeded to trial. The motion to suppress the alleged confessions and statements of the defendants, and each of them, was denied. The court also granted bills of particular, in part, and denied bills of particular, in part.

Briefly stated, Frank Sinatra, Jr., an entertainer and son of the moving picture star and entertainer, Frank Sinatra, Sr., was playing at Harrah's Lodge at Stateline, California. It was the prosecution's theory that the two defendants, Barry Worthington Keenan and Joseph Clyde Amsler, had seized young Sinatra at his room at Stateline, California, transferred him to Nevada and back into California, and held him for ransom of $240,000.

Within a short time after young Sinatra left Stateline, a roommate notified the police that Sinatra, Jr. had been kidnaped. A roadblock was set up between Nevada and California and when the automobile in which Keenan and Amsler and Sinatra, Jr. were riding reached this roadblock, young Sinatra made disparaging remarks about the police, and he said, in effect, "These police bug me."

In his cross-examination he admitted that he then consented to the ride. At least three times during his cross-

examination young Sinatra admitted consent to the ride and at no time did he cry out or identify himself to the police who stopped this vehicle and other vehicles going through.

Sinatra was taken to a house at 8143 Mason Avenue, Canoga Park, California, where he was kept until after negotiations with his father were completed. It was testified that during part of the time that young Sinatra was kept in the Mason Avenue house, Amsler was asleep and Sinatra, who was not tied or restrained in any way, made no attempt to leave the house, the doors of which were unlocked.

Sinatra left the car on Mulholland Drive and was picked up by the Bel-Air Patrol and returned to his mother's house in a patrol vehicle, where he himself had hidden in the trunk. A host of newsmen, photographers and television and radio personnel greeted him and voluminous pictures were taken of him and broadcast. His words to his father, the first person he saw in front of his mother's home, were "I'm sorry, Dad."

Summaries of the testimony of each of the principal witnesses are set forth in the Appendix hereto.

SPECIFICATION OF ERRORS

The appellant specifies the following errors in the record and proceedings:

1. The trial and all proceedings had were void for lack of jurisdiction of the trial court because the trial, as such, with an Oregon judge and an Oregon staff maintaining the court, was not a trial within the State and

District where the alleged crime was committed, as required by Article 3, Section 2 of the Constitution of the United States, and the trial was held in violation of due process of law guaranteed by the Fifth Amendment to the Constitution of the United States.

2. The defendant was deprived of due process of law in that the manner and method of selecting the jury was not in accordance with the procedure and proceedings used in the State of California, the State in which the alleged crime was committed, but was in accordance with the so-called "Arizona System", not authorized under the procedure in the State of California.

3. The court erred in instructions given and refused, and invaded the province of the jury, to which due exception was taken. The court's instructions virtually directed the jury to convict.

4. The court erred in quashing the subpoena to produce Frank Sinatra, Sr. (R 2974) and in refusing to call him back for further examination and further cross-examination.

5. Defendant was denied his constitutional right to a public trial.

6. The court erred in failing to suppress the evidence of alleged confessions made by the accused. The defendant John William Irwin made an alleged confession prior to arraignment and without a search warrant or without the benefit of counsel and was without the benefit of an attorney at the time he allegedly implicated Joseph

Clyde Amsler. None of the defendants had counsel at the time statements were taken from them and none had been arraigned before statements were taken in the absence of counsel representing them and in the absence of the full advice and benefit of counsel. Therefore, the use of these alleged confessions violated due process of law guaranteed by the Fifth Amendment to the Constitution of the United States.

7. The federal court was without jurisdiction to try the defendant Joseph Clyde Amsler. There was no evidence of interstate transportation by Amsler prior to the consent of Frank Sinatra, Jr. to the transportation. There was, in effect, therefore, no kidnaping as that offense is defined. Consent vitiates any alleged kidnaping.

8. The court committed prejudicial error in refusing to give the defendants the names and addresses of all of the prospective jurors in violation of the mandatory statute to supply these names and addresses three days prior to trial in capital cases. The request was made and refused. The court also erred in refusing to supply the defendants with the names and addresses of all the prospective witnesses intended to be called, three days prior to trial, as required by the mandatory statute in capital cases, to-wit: Title 18, Section 3432, U.S. Codes.

9. The evidence is insufficient to support the verdicts. The verdicts are contrary to the law and the evidence. The evidence shows both implied and express con-

sent by Sinatra, Jr. to the transaction. The acts, as described by the principal witness of the government, failed to show any true kidnaping.

10. Although the indictment charged six counts in which the accused was implicated, they were all one alleged transaction and the splitting up of the counts was, in effect, an effort to charge the defendant with several offenses and violated due process of law guaranteed by the Fifth Amendment to the Constitution of the United States. Only one offense was charged.

11. The court erred in overruling the motions to dismiss on the grounds of duplicity. The charge of kidnaping under Section 1201 contains the charge of conspiracy and there was a duplication charging conspiracy under the conspiracy statute, thus doubling the punishment of the defendant.

12. The court erred in refusing defense requests to subpoena John Hanson, an important witness for defendant Amsler, thus violating Sixth Amendment right to process.

13. The court erred in the admission and exclusion of evidence.

14. The court erred in denying counsel for appellant Amsler the right to tape the proceedings, particularly the argument of the prosecutor.

15. The prosecutor was guilty of prejudicial misconduct in presenting other evidence regarding alleged kidnaping that was highly improper. The court erred in

not granting a mistrial as the result of this improper evidence that was foreign to the case, in other words, in reference to an alleged kidnaping regarding Bob Hope's son, not charged in the indictment.

16. The court committed prejudicial error in entering the jury room and discussing matters with the jury in the absence of the defendants and their counsel and then denying the motion for a mistrial. (R. 4025) The procedure violated due process of law guaranteed by the Fifth Amendment to the Constitution of the United States and also denied the right of the defendant to a public trial in all its proceedings.

17. There were illegal searches and seizures under the Fourth and Fifth Amendments to the Constitution of the United States.

18. The court erred in denying the motions for judgments of acquittal.

19. The defendants were tried under an atmosphere of great prejudice and were denied fair trial. The court erred in failing to grant a new trial due to an interview given during the trial by Frank Sinatra, Jr., which was published in the Los Angeles Times on the morning of February 29, 1964. (R. 2972)

20. The court erred in denying a severance of the trial of Amsler from that of the other defendants, to the great prejudice of defendant Amsler.

21. The court erred in failing to suppress the evi-

dence regarding the so-called ransom money. The defense never had any opportunity to see or examine the so-called ransom money, whether there was any money purportedly for ransom. Use of such evidence violated the defendants' rights to due process guaranteed by the Fifth Amendment to the Constitution of the United States.

22. The court erred in limiting the cross-examination of all three defendants to one counsel, although they were separately represented by separate counsel. The court stated he would not let any other defendant cross-examine any further on the subject matter on which one counsel had examined. This was a denial of the right of confrontation of the individual defendant and of cross-examination by the individual defendant.

SUMMARY OF THE ARGUMENT

The appellant, Joseph Clyde Amsler, along with Barry Worthington Keenan and John William Irwin, were indicted by the grand jury on six counts allegedly growing out of the purported kidnaping of Frank Sinatra, Jr. from Harrah's Lodge, on the California side of the Lodge, on or about December 8, 1963, and transporting him through Nevada to 8143 Mason Avenue, Canoga Park, in Los Angeles County, California, purportedly for the purpose of seeking $240,000 from Frank Sinatra, Sr.

The indictment contained six counts, the first and the sixth counts being for conspiracy involving the same transaction, Count One being brought under Title 18, Section

875(a), and Count Six being brought under Title 18, Sections 1201 and 1202.

Count Two involved the charge against John William Irwin of aiding, abetting, counseling, inducing, commanding and procuring the commission of the offense by Keenan and Amsler on or about December 8, 1963.

Count Three alleged that John William Irwin made a telephonic call to Reno, Nevada, making a demand for ransom and reward on December 10 at 9:05 a.m. and that Keenan and Amsler aided and abetted in this offense.

Count Four charged Irwin with having made a telephone call at 12:50 p.m. to Carson City, Nevada, making a demand for ransom and that he was aided and abetted by Keenan and Amsler.

Count Five charged that on December 10, at 1:10 p.m., he made a telephone call to Carson City, Nevada, making a demand for ransom and that he was aided and abetted by Keenan and Amsler.

Count Six charged a violation of Section 1202 of Title 18 in that they knowingly and wilfully received, possessed and disposed of $239,985 which had, on December 11, 1963, been delivered as ransom and reward in connection with the alleged kidnaping of Frank Sinatra, Jr., who had theretofore been kidnaped and then transported in interstate commerce from Stateline, California, into the State of Nevada and then into Los Angeles County, California, in violation of Title 18, Section 1201, U.S. Codes.

Appellant and his codefendants were charged in Count Two of the indictment with violation of Section 1201 of Title 18, U.S. Codes. In Count One of the indictment they are charged with conspiracy to do the same thing, although Section 1201(c) provides for the charge of conspiracy to violate the section independent of Section 371. Count One of the indictment charges conspiracy on the part of the defendants to unlawfully seize, kidnap, carry away and hold for ransom and reward Frank Sinatra, Jr. in violation of 18 U.S.C. Section 1201, etc., with several overt acts set out therein. Count Two alleges that defendants Barry Keenan and Joseph Clyde Amsler knowingly transported in interstate commerce from Stateline, California, into the State of Nevada and then into Los Angeles County, California, within the Central Division of the Southern District of California, one Frank Sinatra, Jr., who had theretofore been unlawfully seized, kidnaped and carried away and held for ransom, and that at the said time and place defendant John William Irwin aided, abetted, counseled, induced, commanded and procured the commission of the alleged offense. (Page 6, Transcript of Record of the Clerk.)

Section 1201 of Title 18 reads as follows:

"(a) Whoever knowingly transports in interstate or foreign commerce, any person who has been unlawfully seized, confined, inveigled, decoyed, kidnaped, abducted, or carried away and held for ransom, reward or otherwise, except, in the case

of a minor, by a parent thereof, shall be punished (1) by death if the kidnaped person has not been liberated unharmed, and if the verdict of the jury shall so recommend or (2) by imprisonment for any term of years or for life, if the death penalty is not imposed. /(b) The failure to release the victim within 24 hours after he shall have been unlawfully seized, confined, inveigled, decoyed, kidnaped, abducted or carried away shall create a rebuttable presumption that such person has been transported in interstate or foreign commerce.

"(c) If two or more persons conspire to violate this section and one or more of such persons do any overt act to effect the object of the conspiracy, each shall be punished as provided in subsection (a). (As amended August 6, 1956)"

In Smith v. United States, 360 US 1, 3 L.ed.2d 1041, at 1046, the court held that Section 1201 is an offense which may be punished by death and therefore it is covered by such rights as whether an accused has a right to obtain a list of veniremen and government witnesses (18 U.S.C., Section 3432); whether venue is properly set (18 U.S.C., Section 3235); whether the accused has the benefit of twenty rather than ten peremptory challenges. (F.R.C.P. Rule 24(b).)

Although demands were made to see the prospective

jury list, these were denied by the court. Furthermore, the prosecution did not furnish the list of witnesses three days prior to the trial, nor did the court allow twenty challenges, but instead limited the defense to ten challenges. (Transcript docketed June 10, 1965, p. 20) The court held his system of selecting jurors was "a fair constitutional way to draw a jury" (R. 104), whereupon challenges took place.

The court ordered the government to supply the defendants with a dily list of witnesses that it expected to call during the following day. (R. 14, Transcript docketed June 10, 1965, Vol. II) The court later stated it expected the defense to supply the government with the names and list of its witnesses in advance of their appearance.

In addition to the foregoing, a brief summary of the argument is set forth in the section of this brief set out above entitled "Specification of Errors."

ARGUMENT

I

THE TRIAL AND ALL PROCEEDINGS HAD WERE VOID FOR LACK OF JURISDICTION OF THE TRIAL COURT BECAUSE THE TRIAL, AS SUCH, WITH AN OREGON JUDGE AND AN OREGON STAFF MAINTAINING THE COURT, WAS NOT A TRIAL WITHIN THE STATE AND DISTRICT WHERE THE ALLEGED CRIME WAS

COMMITTED, AS REQUIRED BY ARTICLE 3, SECTION 2 OF THE CONSTITUTION OF THE UNITED STATES, AND THE TRIAL WAS HELD IN VIOLATION OF DUE PROCESS OF LAW GUARANTEED BY THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

A. THE TRIAL JUDGE, BEING AN OREGON JUDGE FROM THE DISTRICT COURT OF OREGON, WAS UNAUTHORIZED TO SIT IN A CRIMINAL CASE IN A DISTRICT COURT IN CALIFORNIA. THE COURT WAS NO LONGER A COURT OF THE STATE AND DISTRICT WHERE THE CRIME WAS COMMITTED, AS REQUIRED BY ARTICLE 3, SECTION 2, UNITED STATES CONSTITUTION.

B. THE OREGON CLERK WAS NOT SWORN IN CALIFORNIA NOR AUTHORIZED IN CALIFORNIA TO ADMINISTER OATHS AT THE TIME THAT HE PURPORTEDLY ADMINISTERED OATHS TO PROSPECTIVE JURORS. PROSPECTIVE JURORS THEREFORE WERE NOT LEGALLY SWORN AND MANY WERE EXCUSED. THE VOIR DIRE WAS CONDUCTED UPON UNSWORN PROSPECTIVE JURORS.

C. TITLE 28, SECTION 292, PURPORTING TO AUTHORIZE ASSIGNMENT AND TRANSFER OF JUDGES, IS UNCONSTITUTIONAL IN CRIMINAL CASES INSOFAR AS IT PURPORTS TO AUTHORIZE TRANSFER OF JUDGES FROM OTHER STATES AND DISTRICTS, AND VIOLATES ARTICLE 3, SECTION 2, UNITED STATES CONSTITUTION.

D. THE TRANSFER OF THE CASE FROM LOCAL UNITED STATES DISTRICT JUDGE ALBERT LEE STEPHENS, JR., TO JUDGE WILLIAM G. EAST, FROM OREGON, FOR ALL PROCEEDINGS AND TRIAL WAS CONTRARY TO LOCAL RULES ADOPTED BY LOCAL JUDGES, WHICH RULES HAVE THE FORCE OF LAW.

The following occurred at the morning session of the court on Tuesday, February 11, 1964:

"THE COURT: I think I will take up a short matter with the jury first, Mr. Lavine, if you will excuse me.

"Members of the jury, yesterday it was called to the court's attention that the Acting Clerk of this Court, Mr. Don Roberts, who is accompanying the court from Portland to here and is a duly appointed and Acting Deputy Clerk of the Court from the District of Oregon and primarily assigned with duties to the court room of myself, he is not in fact designated as a Deputy Clerk of this District. And while it is not true, as Mr. Bumble said, that the law is as is, it is exact. I learned some time ago that there are no shortcuts to be taken; and since it has been called to the court's attention that the oath that was given to you both as to your qualifications as potential jurors as well as your oath to well and truly try the cause was administered by Mr. Roberts, who was, in fact,occupying a properly constituted

office of the court, I am quite of the opinion that it was a good and valid oath for you. But if I might use an expression of my old-time law partner, out of an abundance of precaution, I shall ask you to take the oath from the court and determine whether or not you reaffirm the answer that you gave. So if you will bear with me with this explanation, I will again ask you to take the following oath: Will each of you raise your right hand. (All jurors raise right hands.)

"Do each of you solemnly swear that the answers that you gave in answer to the questions placed to you upon your qualifications to act as a juror in the cause now pending were full and true according to the best of your knowledge and belief?

"(Jurors answer in the affirmative.)

"And if you will continue, do each of you promise and swear that you will well and truly try and a just and true verdict in this cause return based solely upon the evidence produced in the open court, interpreted under the law given to you in the instructions by the court?

"(Jurors answer in the affirmative.)

"THE COURT: You may proceed, Mr. Lavine.

"MR. LAVINE: May it please the court, may the record show that we object to the jurisdiction of your Honor and this court --

"THE COURT: I am sorry. I beg your pardon. My attention was diverted. May I receive a message?

"MR. LAVINE: I am sorry I continued speaking.

"(Whereupon a pause took place in the proceedings.)

"THE COURT: Yes, Mr. Lavine.

"MR. LAVINE: May the record show two things. First of all, that the proceeding which your Honor conducted this morning after the jury was sworn was not a proceeding conducted in respect to the respective jurors and that the oath that was given to them was given by the Oregon clerk.

"THE COURT: I will let the record stand or fall on itself.

"MR. LAVINE: Thank you. And that we therefore object to the proceedings as violative of the rules of the District Court of the United States and due process of law guaranteed by the Fifth Amendment to the Constitution of the United States. We would also like to register the objection which I have heretofore made, that your Honor is without jurisdiction to try this case because you are an Oregon judge and because of the objections heretofore made, and I would like to have a stipulation, if I may, that that objection may be deemed for each day so I don't

"THE COURT: I well understand your position about it, Mr. Lavine, and I accept it on behalf of all of the defendants, and it may stand as a continuing objection and it will be overruled.

"MR. LAVINE: Thank you, your Honor."

(Transcript of Feb. 11, 1964 (Defense Arguments), pp. 4-6)

Thereafter, the court generally opened with the following statement:

"MR. ROGER B. BUCHANAN (Bailiff): Hear Ye, Hear Ye, the Honorable United States District Court for the Southern District of California is now in session, the Honorable William G. East on Special Assignment from the District of Oregon presiding."

It is respectfully submitted that the court was and is without jurisdiction to have proceeded under the circumstances. The jurors who were being impanelled were never sworn and the only jurors who were purportedly sworn were those in the box and they were sworn by the Oregon judge, who had not been delegated by the President of the United States, or appointed by him, to sit in the Southern District of California, Central Division, nor was there jurisdiction to place anyone else in this area. This was a violation of due process of law guaranteed by the Fifth Amendment to the Constitution of the United

States.

The requirement of Article 3, Section 2 of the Constitution is that all crimes shall be tried by a jury in the State and District where the crime allegedly occurred.

The trial encompasses a court with a judge and all personnel of the State and District where the crime allegedly occurred and not some other State and District. A judge is an integral part of a trial and no trial can be held without a judge.

It is a matter of common knowledge that federal judges are selected from the State and District where trials are held. They are appointed by the President of the United States on the recommendation of the Senator from the State and require the approval of the Senate thereafter. The only person who would be authorized to move the judge or reappoint him to another District would be the President, with the approval of the Senate.

Jurisdiction, therefore, to try the case in the State and District is jurisdiction of the court and the judge appointed for that court, in this case California. Congress alone may adopt penal legislation but the place of trial has been set by the Constitution.

The Constitution provides for Congress to define and punish piracies and felonies committed on the high seas and offenses against the laws of nations (Article 1, Section 8, Clause 10) separately from crimes committed against the States. These do not encompass that they

should be tried other than as directed at the place and by the persons authorized.

Article 3, Section 1, Clause 1 of the Constitution provides that the judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as Congress may, from time to time, ordain and establish. The District Courts only have jurisdiction within their Districts and constitute only the judges appointed in that District insofar as criminal cases are concerned.

We respectfully submit, therefore, that when the trial judges of the Southern District of California were removed from the case, the trial court lacked jurisdiction to proceed. Any procedure thereafter violated due process of law guaranteed by the Fifth Amendment to the Constitution of the United States.

The trial also proceeded in violation of Local Rules as to the assignment and distribution of criminal cases. Chapter II, Rule 3, Local Rules adopted by the United States District Judges of the Southern District of California, Central Division, provided that all criminal cases should go to the Master Calendar Judge assigned to criminal cases. That judge, at the time, was Albert Lee Stephens, Jr. Without his knowledge or consent, and in violation of this rule, the case on the morning of arraignment was transferred from his court to Judge William G. East, an Oregon judge assigned on a temporary basis.

This, we respectfully submit, violated the Local Rules of Court and violated due process of law guaranteed by the Fifth Amendment to the Constitution of the United States.

Local Rules adopted by the judges have the force of law and the procedure which they have agreed upon should be carried out and cannot be violated by the Presiding Judge or anyone else without violating due process of law guaranteed by the Fifth Amendment to the Constitution of the United States.

II

THE DEFENDANT WAS DEPRIVED OF DUE PROCESS OF LAW IN THAT THE MANNER AND METHOD OF SELECTING THE JURY WAS NOT IN ACCORDANCE WITH THE PROCEDURE AND PROCEEDINGS USED IN THE STATE OF CALIFORNIA, THE STATE IN WHICH THE ALLEGED CRIME WAS COMMITTED, BUT WAS IN ACCORDANCE WITH THE SO-CALLED "ARIZONA SYSTEM", NOT AUTHORIZED UNDER THE PROCEDURE IN THE STATE OF CALIFORNIA.

The court committed prejudicial error and denied the defendant due process of law guaranteed by the Fifth Amendment to the Constitution of the United States in the manner of the selection of the jury. The jury was selected according to the so-called "Arizona system" and limited the defendant to ten challenges in this capital case, in contravention to the provisions of Rule 24, and particularly Rule 24(b), Rules of Criminal Procedure, and

Title 18, Section 3432, U.S. Codes. The jury in this case was irregularly drawn and was not properly sworn or selected.

At the session on February 10, 1964, the following occurred (Second Supplemental Transcript, Vol. 2, docketed June 10, 1965, pp. 101-104):

"MR. LAVINE: -- we respectfully challenge Your Honor's order of challenges as unconstitutional, as a violation of due process of law under the Fifth Amendment to the Constitution of the United States and not the practice generally followed in this area or this District and only followed by two judges in this area, and we respectfully urge that this is not -- this would cut down mathematically our number of challenges for this reason: That we are now faced with giving ten challenges as against 37 possible jurors, and this would cut down the number which the law permits us to have. In order words, if we had 12 jurors in the box and we challenged two, the Government one, two, and then jurors are replaced as they are challenged, we may never get to our list of ten. We may be satisfied before that time. Now, if we are required to excuse jurors who are not even called at this time and who are not among the first 12, then we are placed in a mathematical position that cuts down our number of challenges. And we think this was not the practice

intended by Congress or by the makers of the rules.

I have examined Rule 24 of the Rules for the District Courts for the United States, and I think that rule contemplates that we first pick 12 jurors and that a jury of 12 persons is a common law jury that is met by the Constitution to try the cases. And we jointly -- I think I speak for all counsel in this objection -- request that Your Honor, at least to the matter of challenges, revert to the practice which we have had generally in this District and request that the 12 -- that we be allowed to exercise our challenges as against the 12 rather than as against the 37.

"I think Mrs. Root also wishes to comment on that. You go ahead.

"MRS. ROOT: If Your Honor please, I understand that the three separate challenges that Your Honor has given us each for the defendant includes the alternate jurors?

"THE COURT: No, it does not.

"MRS. ROOT: Then it is 13, plus the one per defendant for each alternate juror, is that correct?

"THE COURT: No, the Court advised you that the defendants and the Government proposed that you have one challenge each to the four proposed -- or what is left of the proposed alternates.

"MRS. ROOT: That was our question, if your

Honor pleases.

"THE COURT: You don't have to consider alternates at this stage at all.

"MRS. ROOT: So that in the event that there is a challenge to be exercised as against the alternates, we would have that in excess of the original as given?

"THE COURT: Right.

"MRS. ROOT: That you very much, if your Honor pleases. I think that that clears the entire matter.

"MR. LAVINE: It doesn't clear it as far as my objection is concerned.

"THE COURT: Well, I understand.

"MR. LAVINE: But only as to the alternates that she has referred to now.

"THE COURT: I understand your position about it. It doesn't make any difference in the Court's opinion whether the juror has already been called or waits until you exercise your challenge and waits until he takes his seat. They are all here, and they are in the same rotation whether they be called or not. So I deny your motion.

"MR. CROUCH: Your Honor, I was just going to add something before you made that last comment. You jumped too fast for me. But may I add just one comment to Your Honor?

"THE COURT: Yes, you may.

"MR. CROUCH: As a practical matter, you may have -- in other words, in exercising ten challenges, you may have certain jurors where one may be a little more subject to a challenge than another. Well, we would like the opportunity, if we have 12 people in the jury box, to look at that 12 right there before us and exercise our challenges. It may turn out that we are exercising challenges which never will be used further down the line when we actually could be using that same challenge for a person who winds up in the box, who may be less acceptable to us than --

"THE COURT: You are arguing against Mr. Lavine's motion. He wants the first 12. You have got them.

"MR. CROUCH: No, Your Honor.

"MR. LAVINE: I didn't say that.

"THE COURT: Well, I have ruled on the matter. I am satisfied this is a fair constitutional way to draw a jury, and I propose to follow it. Now, I will ask counsel to exercise your peremptories."

It is submitted that the provisions of Rule 24, Federal Rules of Criminal Procedure, set forth in full in the appendix hereto, are in accordance with due process and the procedure in the State of California and it is respectfully submitted that the court erred in following any other procedure. Furthermore, kidnaping being a capital offense entitled defendants to 20 challenges, which they were denied.

III

THE COURT ERRED IN INSTRUCTIONS GIVEN AND REFUSED, AND INVADED THE PROVINCE OF THE JURY, TO WHICH DUE EXCEPTION WAS TAKEN. THE COURT'S INSTRUCTIONS VIRTUALLY DIRECTED THE JURY TO CONVICT.

The court instructed the jury, in respect to Count Two of the indictment:

> "In connection with Count Two, you are instructed that an act of Congress provides: 'If two or more persons conspire either to commit an offense against the United States and any one or more such persons do any act to effect the object of the conspiracy, each shall be guilty of a crime.'" (R. 4233)

However, Count Two did not charge conspiracy. Count Two of the indictment charged the substantive offense of kidnaping. Count One charged conspiracy under Section 371 of Title 18, an entirely different offense. Although Section 1201 of Title 18 provides in a separate portion thereof to charge conspiracy, the grand jury did not return such a charge in connection with the kidnaping. Therefore, it was highly prejudicial error to charge the jury in respect to Count Two as to the law relating to conspiracy. The defendants were thereby placed on trial on a charge not made by the indictment in violation of due process of law guaranteed by the Fifth Amendment

to the Constitution of the United States.

Cole v. Arkansas, 333 US 196, 92 L.ed. 644

It was as much a violation of due process of law to try the defendants on instructions on conspiracy not charged in the indictment in a different charge as it would be to convict him on a charge never made.

DeJonge v. Oregon, 299 US 353, 362, 81 L.ed. 278

In Cole v. Arkansas, supra, the court said:

> "No principle of procedural due process is more clearly established than that notice of a specific charge and a chance to be heard in a trial of the issues raised by that charge, if desired, are among the constitutional rights of every accused in a criminal proceeding in all courts, state or federal. Re Oliver, 333 US 257, 273, 92 L.ed. 682, 694."

Certainly the indictment did not charge them in Count Two but they were charged with conspiracy. It is certain that they were not tried or found guilty for conspiracy under Section 1201 of Title 18, U.S. Codes.

Furthermore, the attempted trial of the defendants under Title 18, Section 371, was in error since that section must have been implicitly repealted by Section 1201 of Title 18.

See: Krulewitch v. United States, 336 US 340-359, particularly the footnote at page 447, 93 L.ed. 796, in which the court points out that the general conspiracy

statute has been superseded by independent offenses on which it is overlaid.

Conspiracy to violate Section 1201 of Title 18 is one of those statutes. It is respectfully submitted that when a specific statute is passed covering a subject, the general statute is superseded.

The court devoted from page 4233 to page 4242, inclusive, in instructing on the law of conspiracy under Count Two when no such charge was contained in this count. We submit that this was of such a prejudicial character as to require reversal of the judgment below.

We are setting forth, in Appendix B hereof, the instructions complained of, which are quite lengthy.

The court also invaded the province of the jury in giving the instruction on kidnaping (R. 4244-4247), which is also set forth herein in Appendix C. This instruction invaded the province of the jury as the finder of the fact and set out only the government's side of the case on the crucial issues involved herein.

It was the defendants' theory of defense that this was not a true kidnaping; that there was consent by the alleged victim, Frank Sinatra, Jr. to the so-called kidnaping and that therefore it had either ceased to be a kidnaping or was not one in the first place, and that there was a desire on his part to become like his father to gain wide publicity. All of these matters were for the jury to weigh without the interference of the court and without

the court's giving only one side of the issue. It cannot be doubted, as this instruction is read, that the court gave a one-sided instruction invading the province of the jury and negativing the defense of the defendant.

In Bollenbach v. United States, 326 US 607, 619, 90 L.ed. 350, the court said, quoting from Quercia v. United States, 289 US 466, 469, 77 L.ed. 1321, 1324:

> "'The influence of the trial judge on the jury is necessarily and properly of great weight,' Starr v. United States, 153 US 614, 626, 38 L. ed. 841, 845, 14 S.Ct. 919, and jurors are ever watchful of the words that fall from him. Particularly in a criminal trial, the judge's last word is apt to be the decisive word. If it is a specific ruling on a vital issue and misleading, the error is not cured by a prior unexceptional and unilluminating abstract charge."

The charge was one-sided and erroneous and was, in effect, telling the jury that in his opinion the principal witness for the government, Frank Sinatra, Jr. had not really consented (although he had said he had consented) and that the consent was not real, and in effect telling the jury that it was their duty to convict the defendants. This was highly prejudicial.

Breese v. United States, 108 F. 804

It was error for the court to state:

"In answering some of the defense counsels' questions [Frank Sinatra, Jr.] stated in effect he consented to the acts and conduct of the defendants Keenan and Amsler of taking him from his room and transporting him. I point out to you that Frank Sinatra, Jr., also stated he cooperated and complied with the defendants' requests." (R. 4246)

It was for the jury, without interpretation by the court, to determine from all the circumstances in the case what Sinatra's testimony meant and to decide it from his language, his demeanor and all of the facts in the case. It was highly prejudicial for the court to invade that province by giving the jury an instruction to the effect that the jurors may not find the free will consent to have been impliedly given from an instruction that they were to consider that the defendants Keenan and Amsler threatened Frank Sinatra, Jr., at any time with a pistol in a menacing manner or made commands or threats therewith. Then they may infer from such menacing use that they could infer that Frank Sinatra, Jr., inferred and acted accordingly that the pistol was capable of doing bodily harm.

This instruction necessarily invaded the jury's right to determine that Sinatra, Jr., consented to the alleged kidnaping after leaving the hotel and to consider all of the facts, uninterrupted by comments from the court in connection with the transaction and which only gave the

government's side of the matter. The court has a duty in stating the evidence, or any matter regarding the evidence, to inform the jury that it is the trier of the fact and the jury must depend upon its own recollection and its own interpretation and its own inferences as to the evidence. Otherwise, the judge invades the province of the jury.

Wilson v. United States, 232 US 563, 58 L.ed. 728

The court's instructions, in effect, told the jurors to disregard the testimony of the defendants, or not to give it the weight to which it was entitled, and thus invaded the province of the jury, to which exception was duly taken (R. 4279) and the court's statement of the facts did not give two sides of the matter. The objections of counsel for the defendants (R. 4279, et seq.) is set forth in full in Appendix D hereto.

At the beginning of the case, it was understood that objections by one counsel would go for all counsel.

The court rejected a series of instructions proposed by the defendants, all of which are set forth in Appendix E hereof.

Instructions Nos. 1 to 12, inclusive, were proposed under the defendants' theory of defense and were all rejected by the court, exception being duly noted and a request having been made for having them given. It was prejudicial error to decline to give these instructions.

Defendants' proposed instruction No. 13 set forth the theory of the defendants regarding the illegality of the statements secured after their arrest and in violation of their constitutional rights.

Defendants' proposed instruction No. 21, defining kidnaping, was a correct statement of the law and of the defense theory, and was rejected by the court.

It is appellant's contention that, by the instructions to the jury regarding the issue of consent, the judge virtually told the jury to convict the defendants and took away from the jury the fair opportunity to consider the defendants' defenses of the consent and possible collusion and cooperation of Sinatra, Jr. Whatever the judge thought of the defenses, it was not for him to decide, as the case had to be tried by the jury. It was for the jury to pass upon the defenses from all the direct circumstantial evidence as well as direct evidence and the admissions of the principal witness on cross-examination, the relationship of the parties and all of the events which occurred.

The judge's instructions virtually told the jury how to draw their inferences and conclusions and how to vote, and thus denied the defendants fair trial and due process of law guaranteed by the Fifth Amendment to the Constitution of the United States.

IV

THE COURT ERRED IN QUASHING THE SUBPOENA TO PRODUCE FRANK SINATRA, SR. (R. 2974) AND IN

REFUSING TO CALL HIM BACK FOR FURTHER EXAMINATION AND FURTHER CROSS-EXAMINATION.

A motion to produce Frank Sinatra, Sr., for the defense was made in order that there might be evidence that the money involved in the case was actually secured for the purpose of ransom and reward and not for publicity or some other reason.

Mr. Sheridan, the prosecutor, stated to the court that Sinatra, Sr., was not present in the continental limits of the United States but did not say that they could not actually produce him. However, he and Mr. Sinatra's counsel moved to quash the subpoena under Rule 17(b). (R. 2976) The court required the defense to make an offer of proof. Defendants' counsel objected on the grounds that this was an invasion of their constitutional rights (R. 2976) and the court required him to make a showing.

The court had earlier made an order requiring Mr. Sinatra, Sr. to be present upon the serving of a subpoena with a Marshal. Mr. Sinatra did not show up and counsel stated that "We have some very definite things that we think are vital to the defense or I would not seek to have him here". (R. 2977) Counsel stated "Do I understand now that your Honor is withdrawing his previous order?" (R. 2977) The court said he was considering it.

Counsel argued that the presence of Frank Sinatra, Sr. was vital to determine the purpose for which the money was put up, whether actually for ransom or reward

or for the purpose of publicity or some other scheme or device to advance the interests of the Sinatras. The complete text of counsels' argument (R. 2979-2983) is set forth herein in Appendix F.

The court then granted the motion to suppress the subpoena and stated that to cause the Marshal to serve it upon Mr. Sinatra's residence in Palm Springs or to make any other search for him within the United States "would be an oppressive and unreasonable use of the process of the court. Your motion, Mr. Rudin, is allowed". (R. 2984).

It is respectfully submitted that the quashing of the subpoena to produce Sinatra, Sr., was a denial of the defendants' constitutional rights under the Sixth Amendment to the Constitution of the United States.

Pointer v. Texas, 13 L.ed.2d 923

Douglas v. Alabama, 13 L.ed. 2d 934

The court, in denying defendant's right to have Frank Sinatra, Sr. return on behalf of the defendant Clyde Joseph Amsler denied him the right of confrontation guaranteed by the Sixth Amendment to the Constitution of the United States and denied him the processes of the court as guaranteed by the Sixth Amendment.

Amsler had a constitutional right to have Sinatra, Sr. present, to confront him and to be subject to a vigorous cross-examination on the issue of whether the money he had secured was money for publicity or otherwise. He did not have to rely on the government's case or on the

cross-examination for his defense. He had a right to put on his defense independently and to have the witness present. It was an abuse of process and an abuse of the constitutional right of the defendant for the court to release Sinatra, Sr., and to quash the subpoena.

The court had granted the motion to have the Marshal subpoena Sinatra, Sr., and it was prejudicial error for the court to quash the subpoena duces tecum on the motion of Sinatra's attorney, Milton Rudin.

Sixth Amendment, United States Constitution

United States v. Seegar, 180 F.Supp. 467

Ridwell v. Aderholt, 13 F.Supp. 253

Taylor v. United States, 329 F.2d 384

United States v. Reid, 12 Howe (53 US 361, 13 L.ed. 1023)

Goldsby v. United States, 160 US 70, 40 L.ed. 343

Blackmer v. United States, 284 US 421, 76 L.ed. 375

United States v. Burr, Fed.Cas. 14,692

United States v. Kenneally, Fed.Cas. 15,522, 5 Biss. 122

Dupuis v. United States (CCA 9), 5 F.2d 231

Austin v. United States (CCA 9), 19 F.2d 127, cert. den. 275 US 523, 72 L.ed. 405

Refusal to attend is a contempt.

Ex parte Judson, Fed.Cas. 7561, 3 Blatchford 89

In re Ellerby, 13 F. 530

In Douglas v. Alabama, 13 L.ed.2d 934, at 937, the court said:

"We decided today that the confrontation clause of the Sixth Amendment is applicable to the States. Pointer v. Texas, 13 L.ed.2d 923. Our cases construing the clause hold that a primary interest secured by it is the right of cross-examination. An adequate opportunity for cross-examination may satisfy the clause even in the absence of physical confrontation. As the court said in Maddox v. United States, the primary object of the constitutional provision in question was to prevent depositions or ex parte affidavits being used against a prisoner in lieu of a personal examination and cross-examination of the witness in which the accused has an opportunity not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief. (156 US 237, 242, 243, 39 L.ed. 409, 411. See also 5 Wigmore, Evidence, 1365, 1397; State v. Hester, 137 S.Ct. 145, 189, 134 S.E. 885, 900.)"

The Sixth Amendment to the Constitution of the

United States not only provides for the right of confrontation of witnesses against him, but also provides to have compulsory process for obtaining witnesses in his favor, without offers of proof or without having the court pass on whether he can have the witness or not, as was done in this case.

Rule 17, Federal Rules of Criminal Procedure, provides for the compulsory production of witnesses in compliance with the Sixth Amendment. Insofar as Rule 17(b) is concerned requiring the defendant to disclose his defense or make a showing allowing the judge to quash the subpoena, as was done in this case, we respectfully contend that it is a violation of the defendant's constitutional rights under the Fifth Amendment not to require him to incriminate himself in order to produce witnesses in his behalf.

Griffin v. California, 14 L.ed. 2d 106

All that the defendant needs to show is that he requires the witness for his defense.

It is respectfully submitted that the refusal to have Sinatra, Sr., present denied the defendant an essential element in this case, and that is to prove whether the money was put up for ransom or reward, as contended by the government, and to make available to the court and jury all of the facts and circumstances that might make a showing in this respect.

The denial of this right constituted a denial of

rights accorded the defendants under the Sixth Amendment to the Constitution of the United States.

V

DEFENDANT WAS DENIED HIS CONSTITUTIONAL RIGHT TO A PUBLIC TRIAL.

During the course of the trial the court, through an order of the U.S. District Judges, excluded all the television people and cameramen from the second floor of the Federal Building, where the trial was being held. A motion was made to vacate this order (C.T. 59) on the ground that it would deprive the defendants of a public trial as guaranteed by the Constitution of the United States. The motion was denied and the court upheld the right to bar all photographers from the courtroom. The order, prohibiting all forms, means and manners of taking photographs or broadcasting or televising on or from specified portions of the Federal Building (including the entire second floor and hearing rooms and corridors), is set forth in the Appendix hereto (Appendix A, pages 13-17).

It is respectfully submitted that this order violates the Sixth Amendment to the Constitution of the United States guaranteeing to every accused a public trial. Newspaper photographers and television cameramen are just as much a part of the public and are just as much entitled to attend the judicial proceedings as any other segment of the public and it is is their right to record and tell the

public what is going on in the courtroom. It is for the protection of the public and in the best interests of the public that this is done.

The knowledge that all public acts are subject to public review is an effective restraint upon judicial power.

Matter of Oliver, 333 US 257, 267, 92 L.ed. 682

Publicity has always been deemed to play an important role by inducing the fear of exposure of testimony falsely given as well as in bringing notice of pursuing to the attention of possible witnesses who may not be aware of them.

See: Tankersley v. United States, 145 F.2d 58, 59

Justice must be administered openly.

Ray v. Ray, 195 Ore. 252, 25 P.2d 884

A lawsuit is public business, to be conducted openly.

Palestroni v. Jacobs, 77 A.2d 183, 10 NJ Supp. 266

In re Oliver, supra, condemns secret trials from all or any part of the public.

In this case, unlike other cases which have heretofore come before this court, a defendant has not objected to full publicity regarding the trial. The First Amendment to the Constitution of the United States guarantees the freedom of the press. It does not specify which form of press shall not be free, whether readio, television, photographic press or television press. It makes the use of public facilities free to all of the public.

The federal judges have no power to exclude this portion of the public any more than they have to exclude all women from the courtroom, or all persons who are in the military service or in uniform, or any other group of persons. The federal courts and the federal court buildings belong to the people. They were paid for by all of the people and not by the judges who preside over them.

We attached hereto, as Appendix G, an editorial as a part of our argument, which expresses a view which we urge upon the court.

We respectfully assert that the order which Judge East enforced deprived the defendant of a part of the public in the trial of his case and was a violation of the First and Sixth Amendments to the Constitution of the United States, the First Amendment guaranteeing the freedom of the press and the Sixth Amendment guaranteeing a public trial.

VI

THE COURT ERRED IN FAILING TO SUPPRESS THE EVIDENCE OF ALLEGED CONFESSIONS MADE BY THE ACCUSED. THE DEFENDANT JOHN WILLIAM IRWIN MADE AN ALLEGED CONFESSION PRIOR TO ARRAIGNMENT AND WITHOUT A SEARCH WARRANT OR WITHOUT THE BENEFIT OF COUNSEL AND WAS WITHOUT THE BENEFIT OF AN ATTORNEY AT THE TIME HE ALLEGEDLY IMPLICATED JOSEPH CLYDE AMSLER. NONE OF THE DEFENDANTS HAD COUNSEL AT THE TIME STATEMENTS WERE TAKEN FROM THEM AND NONE HAD BEEN ARRAIGNED BEFORE STATEMENTS

WERE TAKEN IN THE ABSENCE OF COUNSEL REPRESENTING THEM AND IN THE ABSENCE OF THE FULL ADVICE AND BENEFIT OF COUNSEL. THEREFORE, THE USE OF THESE ALLEGED CONFESSIONS VIOLATED DUE PROCESS OF LAW GUARANTEED BY THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

We start with the confession of John William Irwin. Irwin, a painter and a friend of Barry Keenan's mother (formerly Mrs. Keenan and at the time of trial, Mrs. Schaeffer), went to his brother's home in San Diego. (R. 3601) He told his brother that he was involved in the Frank Sinatra, Jr. kidnaping and his brother made a telephone call to the FBI. (R. 3601) He talked and said he had been involved in the removal of Frank Sinatra, Jr. and he wanted to give himself up. They ultimately came to his brother's place and he was waiting outside. (R. 3602)

On December 16, 1963 he was taken into custody at his brother's home at 1124 Florida Street, Imperial Beach (San Diego County), California, and was questioned by the officers on their arrival. Irwin stated that he had $50,000 of ransom money in two suitcases in his automobile and he voluntarily turned the keys to his automobile over to FBI agent Thomas B. Mitchell, who was accompanied by agent Robert G. Moore. They went to the car, opened the attache case and observed that this contained money.

Irwin's brother had suggested that they contact an

attorney and tried, but they were unable to reach any attorney and Irwin then was taken to the FBI offices in San Diego at approximately 9:25 a.m. on December 13. He also turned over to special agent Robert G. Moore a ring with the initials "F.S." on it. He then made a lengthy statement to the FBI agents outside of the presence of any attorney and prior to any arraignment.

On arrival at the FBI offices Irwin asked if he could speak to Frank Sinatra, Jr. (R. 3604) and they said no. There were three persons in the room: Mr. Fields, Mr. Armstrong and Mr. Jones. He does not recall anything being said to him about an attorney. There was a recording machine there at the time and they began asking him questions and recorded his statements and conversations. (R. 3605, et seq.) There was also a stenographer who started to take things down. (R. 3609) He did not dictate the part of the statement that he had been advised that anything he said could be used against him. (R. 3611) The statement that was dictated was by agent Fields.

Five tapes of recordings were taken from Irwin outside of the presence of Amsler and outside of the presence of any attorney and were later introduced in evidence in the trial of this case. This violated the rule of Massiah v. United States, 377 US 201, 12 L.ed.2d 356.

At 12:05 a.m. December 14, 1963, Joseph C. Amsler was located by Assistant FBI Director Joseph J. Casper, Curtis E. Lynum and William G. Simon and Supervisor Robert

E. Gebhardt, at 3825 3/4 Dunn Drive, Culver City, in an apartment occupied by Roger Dier. He was taken to the FBI headquarters and questioned prior to any arraignment. The agents stated that he was advised of his right to counsel, but at that hour of the morning no counsel was available and he was questioned at considerable length prior to arraignment in violation of the McNabb rule and in violation of his constitutional rights. Amsler denied that the confession and the interviews were free and voluntary. (R. 3115, et seq.)

The use of his statement and confession, therefore, were in violation of the Fifth Amendment to the Constitution of the United States and the following cases:

McNabb v. United States, 318 US 332, 87 L.ed. 819

Gross v. United States (9th Cir.), 136 F.2d 878

Anderson v. United States, 318 US 350, 87 L.ed. 829

United States v. Mitchell, 322 US 65, 88 L.ed. 1140

Massiah v. United States, 377 US 201, 12 L.ed.2d 356

Escobedo v. Illinois, 378 US 478, 12 L.ed.2d 977

Rule 5, Federal Rules of Criminal Procedure

The statements of Keenan were also introduced in evidence against appellant. Starting at 1:35 a.m. on December 14, 1963, he was interviewed at the Los Angeles office of the FBI. He was not arraigned until about 4 o'clock

that morning.

At 3:40 a.m. he was transported from the Los Angeles office of the FBI to the office of Commissioner Theodore Hocke in Los Angeles for arraignment, but the statements that were taken prior to arraignment and outside of the presence of any attorney were introduced in evidence and used as against the defendant Amsler. This violated the rule of Massiah v. United States, 377 US 201, 12 L.ed.2d 356.

Keenan was first advised that his father had employed a Mr. Rex Ellis as his attorney and Ellis had contacted him on December 14 at the county jail and he expected a visit from Mr. Ellis.

Keenan's statement, made in the absence of counsel and in the absence of defendant or defendant's counsel, was thereafter presented in the trial. This likewise violated the rule laid down in Massiah v. United States, supra.

The use of the alleged confessions, therefore, violated due process of law guaranteed by the Fifth Amendment to the Constitution of the United States.

VII

THE FEDERAL COURT WAS WITHOUT JURISDICTION TO TRY THE DEFENDANT JOSEPH CLYDE AMSLER. THERE WAS NO EVIDENCE OF INTERSTATE TRANSPORTATION BY AMSLER PRIOR TO THE CONSENT OF FRANK SINATRA, JR. TO THE TRANSPORTATION. THERE WAS, IN EFFECT, THEREFORE, NO KIDNAPING AS THAT

OFFENSE IS DEFINED. CONSENT VITIATES ANY ALLEGED KIDNAPING.

The evidence in this case as to the purported alleged transaction nullifies any kidnaping in interstate commerce. If we assume that young Sinatra had no knowledge of the fact that he was to be taken and removed on December 8 from Harrah's Lodge, in California, nevertheless, before he left California he had consented to the trip.

Many interesting things are revealed by the testimony in this case, and the case offers some unexplained mysteries which still have not been resolved, namely, how Frank Sinatra, Jr.'s room mate, within a short time after he left the hotel, knew he had been "kidnaped" and notified the police and authorities to that effect.

Thereafter, Sinatra's own attitude of consent to the trip and the failure to make any outcry or to notify any of the officers regarding his identity or his whereabouts or his trip is suspect.

We submit that consent vitiates any kidnaping. A man may pick up a young lady against her will and consent and start taking her for a ride for possible sexual purposes and she thereafter consents to all of these things. The element of kidnaping certainly has disappeared.

So, here, there was, in effect, no kidnaping as that offense is defined. (Sorrells v. U.S., 57 F.2d 973)

VIII

THE COURT COMMITTED PREJUDICIAL ERROR IN

REFUSING TO GIVE THE DEFENDANTS THE NAMES AND ADDRESSES OF ALL OF THE PROSPECTIVE JURORS IN VIOLATION OF THE MANDATORY STATUTE TO SUPPLY THESE NAMES AND ADDRESSES THREE DAYS PRIOR TO TRIAL IN CAPITAL CASES. THE REQUEST WAS MADE AND REFUSED. THE COURT ALSO ERRED IN REFUSING TO SUPPLY THE DEFENDANTS WITH THE NAMES AND ADDRESSES OF ALL THE PROSPECTIVE WITNESSES INTENDED TO BE CALLED, THREE DAYS PRIOR TO TRIAL, AS REQUIRED BY THE MANDATORY STATUTE IN CAPITAL CASES, TO-WIT: TITLE 18, SECTION 3432, U.S. CODES.

The court erred in refusing the defendants the names and addresses of the prospective jurors and prospective witnesses at least three days before trial.

Congress has made it mandatory for the prosecution to furnish the defense with the names and addresses of all prospective jurors and all prospective witnesses in capital cases. Title 18, Section 1201, U.S. Codes, the kidnaping statute, is a capital statute. It is not what the government asks in the trial of the case, but what the statute itself provides as possible punishment which determines the type of crime.

Title 18, Section 3432, U.S. Codes, requires the prosecution to furnish to the defendant the names and addresses of all prospective jurors and all prospective witnesses prior to trial.

See: Smith v. United States, 360 US 1, at 8-9, 3 L.ed.2d 1041, 1047-1048

The failure to comply with this mandatory statutory rule requires a reversal of the judgment below.

IX

THE EVIDENCE IS INSUFFICIENT TO SUPPORT THE VERDICTS. THE VERDICTS ARE CONTRARY TO THE LAW AND THE EVIDENCE. THE EVIDENCE SHOWS BOTH IMPLIED AND EXPRESS CONSENT BY SINATRA, JR. TO THE TRANSACTION. THE ACTS, AS DESCRIBED BY THE PRINCIPAL WITNESS OF THE GOVERNMENT, FAILED TO SHOW ANY TRUE KIDNAPING.

The court should have granted judgments of acquittal to appellant Amsler.

The whole transaction, looked at objectively, was supposed to be an alleged kidnaping of Frank Sinatra, Jr. for ransom from Harrah's Lodge, at Stateline, California, through Nevada and back to California, in a Boston-like blizzard. At the time of the crime Frank Sinatra, Jr. had been away from his father since he was 14 years old (he was 20 at the time of the occurrence, earning only $100 a week and was down at the bottom of the marquee). Therefore, the actions of Frank Sinatra, Jr. appear to be suspect of chicanery from start to finish.

As appellant and Keenan, not an appellant, entered the room of Sinatra where he and John Foss had been drinking beer and chatting, they apparently took $20 away in the

course of a possible alleged robbery. They left Foss there. Foss, who was one of the musicians connected with Sinatra's performance at Lake Tahoe, quickly reported that Sinatra had been kidnaped. Sinatra, Jr. did not raise any question as to why the men were taking him and where they were taking him and what was the object of it.

When they reached the police blockade after driving some 30 miles down Highway 50 at the junction of Highway 395, they observed that there were some red lights and they stopped. At that time a Nevada policeman came up to the vehicle and inquired why it had stopped. Frank Sinatra, Jr. was sitting in the back seat of the car. Amsler took off, went down into the snow and hid out and Mr. Keenan, in order to avoid and erase suspicion, climbed out of the car, got underneath the back of the car and was adjusting the chains on his automobile. Drank Sinatra, Jr. was sitting there all alone in the back seat watching all of this performance. He did not sound any alarm. Nothing was said. He did not make any outcry. He did not tell the police that he had been kidnaped or that he was Frank Sinatra, Jr. As a matter of fact, before they got to the roadblock he made a point of removing his ring and giving it to one of the defendants. He said this could cause him to be identified and he did not wish to be identified.

After they started to drive through the roadblock,

another officer appeared and charged at the car with a shotgun and said "Stop, kid, or I'll blow you out of that seat", or words to that effect. As a result, the windows came down and the shotgun was put into the car at Mr. Keenan's head. Frank Sinatra, Jr. sat in the back seat, gave no alarm and did not tell the officer that he was Frank Sinatra, Jr. and that he was being taken for a ride. He did not do this because he was giving his express consent at that point to all of this transaction. He later makes the statement that, in effect, these officers "bug" him.

The car door was not locked. Frank Sinatra, Jr. did not say to any of the officers "I'm the fellow that youre looking for". He never cried out at any time. Three times he testified he had consented to the whole thing.

The officers at the roadblock were armed with army carbines, shotguns, magnums, revolvers, and sub-machine guns. There were four cars there. The officers at the roadblock were Lt. Newton, Officer Dunn, Officer McGinn, Officer Simon, Officer Wendall, Officer Jones and Officer Canatse. (R. 4122) This roadblock was heavily armed and the officers all had flashlights and flares. Yet Sinatra, Jr. made no effort to make himself known or to tell the officers to arrest the men.

Sinatra, Jr. was enjoying it. It was exciting to him. He was consenting and going along with it.

After they left the roadblock Sinatra, Jr. said, in

substance, "That s.o.b. Who in the hell does he think he is." Then he said "Cops like that bug me. If I ever have the power I'll see that he's taken care of." Then a few minutes later he said "You guys don't have to worry about me. I'll help you. Don't worry about roadblocks." Certainly this is not the picture of a man who is afraid, who is being kidnaped and who at that time does not even state that he is being kidnaped but his roommate, John Foss, who strangely enough wasn't taken along, was reporting a kidnaping.

At another time, Frank Sinatra, Jr. was sitting alone in the back of the car and could have slipped out of that car and been half-way back to Los Angeles and Barry Keenan, the driver, would not have known about it. Amsler was not in the car, but Sinatra, Jr. didn't even try it. He just stayed there in the back seat. At a later point they stopped for gasoline and Mr. Murphey worked on the car. Mr. Dondero, a State maintenance man, was close enough to chat with Murphey. Sinatra knew that there was more than one person there but he does absolutely nothing. When they got to the Mason Street address, Sinatra, Jr. saw the room and there was a telephone. He did nothing, although he realized he was alone. He made no effort to use the telephone.

After they reached the Mason Street address, Amsler fell dead asleep. Again Mr. Sinatra could have left there, as he was all alone. At other times he (Sinatra,

Jr.) entertained the appellant here with stories and songs. The total amount which Amsler received in connection with the whole matter was $100. (R. 3460)

There is a failure to prove any intent on the part of Amsler to kidnap anyone. Amsler stated that Keenan told him a story about a plan he had that was foolproof and that he had a prescribed plan and a prescribed script. As a matter of fact, he said he had made a dry run of the thing. He said that Mr. Sinatra had consented and that if anything arose over it and they were arrested that bail would be furnished them and also, possibly, an attorney. A bail bondsman did appear at the jail shortly after Amsler was placed in custody and offered to bail him out if he would plead guilty and "admit" the kidnaping and tell the story. Amsler promptly refused the offer and called for the FBI. This certainly was not the actions of a kidnaper.

The whole transaction is suspect. Certainly it does not measure up to the statutory definition of "knowingly transporting in interstate commerce a person who has been unlawfully seized" or kidnaped and held for ransom or reward or otherwise. At the time of the transportation there was no discussion of his being seized unlawfully or kidnaped or carried away for ransom or reward or otherwise and this did not develop until later, if at all.

Certainly, whatever transactions took place after the trip started and while they were still in California were

consented to and thus negatived any kidnaping, carrying away or abduction for ransom or reward.

Frank Sinatra, Jr. avoided meeting the newspaper men and hid in the trunk of an automobile of one of the security officers in the neighborhood until he reached the house of his mother and had a chance to confer with the lawyers. When he saw his father he said "I'm sorry, Dad". This is a strange and unusual remark for a person who supposedly was kidnaped. Was he like a boy who had just been through a big episode, that he had arranged, coming home at 4 o'clock in the morning? What was his story about? If he actually had been kidnaped he had no reason to be sorry, he had only to give an explanation of what happened. The defense opened it up and left it there for the prosecution to explore, but there was no exploration of the matter by the government.

X

ALTHOUGH THE INDICTMENT CHARGED SIX COUNTS IN WHICH THE ACCUSED WAS IMPLICATED, THEY WERE ALL ONE ALLEGED TRANSACTION AND THE SPLITTING UP OF THE COUNTS WAS, IN EFFECT, AN EFFORT TO CHARGE THE DEFENDANT WITH SEVERAL OFFENSES AND VIOLATED DUE PROCESS OF LAW GUARANTEED BY THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES. ONLY ONE OFFENSE WAS CHARGED.

Although the government has charged six counts, the six counts were and are duplicitous and prejudicial to

the defendant.

Actually, kidnaping encompasses all of the acts charged in all of the other counts. Therefore, the government has actually built up the case into a series of separate acts where actually only one act occurred, to-wit: the alleged kidnaping which involved all of the elements charged in the other acts.

See: Kotteakos v. United States, 328 US 750, 90 L. ed. 1557

Therefore, appellant's rights to due process under the Fifth Amendment to the Constitution of the United States were violated.

XI

THE COURT ERRED IN OVERRULING THE MOTIONS TO DISMISS ON THE GROUNDS OF DUPLICITY. THE CHARGE OF KIDNAPING UNDER SECTION 1201 CONTAINS THE CHARGE OF CONSPIRACY AND THERE WAS A DUPLICATION CHARGING CONSPIRACY UNDER THE CONSPIRACY STATUTE, THUS DOUBLING THE PUNISHMENT OF THE DEFENDANT.

Count One of the indictment, the conspiracy count, necessarily merged in Count Two of the indictment and the other counts for the reason that all of the acts charged as a conspiracy were also the acts charged as the substantive crime.

Therefore, although conspiracy is a separate crime, when each and all of the acts are the same in the

conspiracy as in the substantive crime, there is a merger and they both cannot be tried and the defendant was thereby highly prejudiced.

Kotteakos v. United States, 328 US 750, 90 L. ed. 1557

XII

THE COURT ERRED IN REFUSING DEFENSE REQUESTS TO SUBPOENA JOHN HANSON, AN IMPORTANT WITNESS FOR THE DEFENDANT AMSLER, THUS VIOLATING SIXTH AMENDMENT RIGHT TO PROCESS.

The court committed prejudicial error in refusing Amsler a subpoena to call John Hanson as a witness in support of his innocent intent and in rebuttal of government contentions. The refusal to call this important witness was highly prejudicial to the defendant Amsler.

John Hanson had worked with the defendant Amsler prior to this case. They had had conversations with reference to the matter. Mr. Amsler told the jury that Mr. Hanson did not participate in the scheme; that he and Hanson were up at Santa Barbara and he had told Hanson regarding what Keenan had related (R. 3460), that Keenan had stated he had a perfect scheme worked out and the reason it was perfect was that Frank Sinatra, Jr. was to know about it. (R. 3461) There was also present during this conversation a Johnny Long. The conversation took place between November 22 and November 30, 1963.

Amsler testified that he honestly believed that Barry

Keenan had a scheme all worked out "when Frank was so cooperative in the room, and then when he told us how to get through the roadblocks and gave us his ring and told us that -- to keep it so they wouldn't recognize him". (R. 3462) The United States Attorney tried to bring out that Amsler had used the words "rich fag" (R. 3484), that they had run into a rich fag in the bar and that he had a plan for the kidnaping. He denied ever making such statements and he denied he ever told Hanson that he went to this person's home up in the canyon.

Thereupon, counsel sought to have Hanson produced as a witness for the defense and petitioned the court for an order to bring Hanson in to testify on this matter. (R. 3486) The court denied the motion. (3487)

It is respectfully submitted that this was prejudicial error. Hanson was a very important witness to prove any statement that he had made that the defense was attempting to convey to the jury that there was to be a foolproof kidnaping. (R. 3488) He was a necessary and essential witness in the matter.

XIII

THE COURT ERRED IN THE ADMISSION AND EXCLUSION OF EVIDENCE.

Ronald Bray was asked the following question:

"Q.Are you hoping by this testimony that you are giving favorable to the prosecution, if it is, that you will not be prosecuted as

a co-conspirator?

"THE COURT: Don't answer that.

"MR. SHERIDAN: Objection as to the way the question is framed, your Honor.

"THE COURT: It is sustained." (R. 2043)

The only answer the witness was permitted to give was "I hope I am not linked with this". (R. 2043)

Again, on cross-examination the court erred in refusing to allow Bray to answer this question:

"Q. Isn't it a fact that he (Keenan) told you that you would not be prosecuted because Mr. Frank Sinatra, Jr. was cooperating?

"MR. SHERIDAN: Asked and answered as to the last part, your Honor.

"THE COURT: He answered in the negative, Mr. Forde." (R. 2117-2118)

It was an important question in support of the defendant's position that Keenan had told people that they would not be prosecuted if they participated because Frank Sinatra, Jr. was cooperating.

XIV

THE COURT ERRED IN DENYING COUNSEL FOR APPELLANT AMSLER THE RIGHT TO TAPE THE PROCEEDINGS, PARTICULARLY THE ARGUMENT OF THE PROSECUTOR.

It was a violation of defendant's right not only to a public trial, but to have all of the proceedings recorded himself. (R. 4036) Counsel for appellant Amsler brought

to court his portable Uher tape recorder, which he sat on the floor. Counsel asked the court for permission to use the tape recorder to tape the argument of the prosecutor, as the court reporter would be unable to transcribe the argument during the day and possibly not for some days and he wanted to get the prosecutor's argument and refer to it during the noon hour, and he intended to tape that argument and his own. (R. 4037) The court said he had no objections to doing it (R. 4038), then later on the court withdrew the privilege and denied the right of counsel to continue taping the prosecutor's argument and to use the tape recorded during the argument of the prosecutor or himself. (R. 4097)

The court's ground for recalling his permission was that counsel's tape might be used in some way to put on a wedge to find devices to impeach the official record of the court. (R. 4098) The court further stated, for the record, that it would be a contempt if a recording made by counsel would in anywise ever be attempted by any person to be used to impeach in some way or contradict or somehow impugn the official record. (R. 4098)

Counsel for an accused has a right to take notes by pen, pencil, shorthand and by a silent recording device that in no way disturbs the court or seeks in any way to interfere with the court proceedings as was the case here. It was an interference with defendant's right to take the exact words of the prosecutor and be able to answer them

exactly. The official court reporter could not get it out in time, nor was counsel required to buy the transcript or pay for it.

This was a public trial and public trial requires the right to see and hear and record what is seen and done, a denial of which is a denial of public trial guaranteed by the Fifth and Sixth Amendments to the Constitution of the United States.

XV

THE PROSECUTOR WAS GUILTY OF PREJUDICIAL MISCONDUCT IN PRESENTING OTHER EVIDENCE REGARDING ALLEGED KIDNAPING THAT WAS HIGHLY IMPROPER. THE COURT ERRED IN NOT GRANTING A MISTRIAL AS A RESULT OF THIS IMPROPER EVIDENCE THAT WAS FOREIGN TO THE CASE, IN OTHER WORDS, IN REFERENCE TO AN ALLEGED KIDNAPING REGARDING BOB HOPE'S SON, NOT CHARGED IN THE INDICTMENT.

During the introduction of evidence by Mr. Sheridan, he asked the FBI agent whether anything further was said and brought out a purported conversation between the defendant and the FBI agent as follows:

"MR. LAVINE: If your Honor pleases, yesterday during the examination by Mr. Sheridan, on page 2677 of the transcript, if your Honor has another copy there --

"THE COURT: I don't have, but I will hear you.

"MR. LAVINE: Mr. Sheridan asked the witness, the FBI agent, as to whether Mr. Amsler -- whether anything was said further, page 2677, in the interview, and the witness said, 'Yes, sir.' Then he said:

"'Q What did he say in that regard?

"'A He said he started thinking along his own experiences as to who might have enough money to be a victim of a kidnaping, and he first thought of a former schoolmate of his.

"'Q Did he name him?

"'A Yes, sir, he did.

"Q Who was it?

"'A He named Tony Hope.

"Q Did he say who Tony Hope's father was?

"' Yes. Tony Hope's father is Bob Hope.

"'Q Did he say why, did he discuss as to whether or not he abandoned the idea of kidnaping Tony Hope?

"'A Yes, sir. He said he abandoned the idea -- he had known Tony Hope from grammar school days, they had gone to school together, and he did abandon the idea.

"'Q Did he say why?

"'A Yes, sir. He said that Mr. Hope was so highly regarded, and -- he said this thought of Tony Hope was only fleeting, it was of short duration. He made no effort or plans looking towards Hope.

"'Q It never got beyond the idea stage, then?

"'A That's right, sir.

"'Q Did he mention any other victim, potential victim, other than Tony Hope?

"'A He advised -- after discussing Hope, he immediately thought of Frank Sinatra, Jr.'

"No, if your Honor pleases, we submit that this testimony regarding another alleged offense not charged in any indictment or information and highly prejudicial to my client and to the other defendants, and I am authorized to speak for Mrs. Root and I believe I am authorized to speak also for the other counsel, all counsel in the case.

"And following this very short narrative of this matter the publication in the newspapers played this in great headlines which the jury could not help but see.

"At this time I move for a mistrial on the grounds of improper evidence which has polluted

"'Q Did he say why?

"'A Yes, sir. He said that Mr. Hope was so highly regarded, and -- he said this thought of Tony Hope was only fleeting, it was of short duration. He made no effort or plans looking towards Hope.

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"And following this very short narrative of this matter the publication in the newspapers played this in great headlines which the jury could not help but see.

"At this time I move for a mistrial on the grounds of improper evidence which has polluted

the stream, so to speak, of this case of justice and prevents a fair trial.

"THE COURT: Are you complaining of news media of this trial?

"MR. LAVINE: I am complaining first of the improper matter in connection with the introduction in evidence in the case of matters that were foreign to this case and should have been excluded by the prosecutor in his questioning. That is my first objection.

"THE COURT: Yes.

"MR. LAVINE: And then the second one follows that the news media picked it up and caused further prejudice in this matter. I legally complain, first of all, of the improper introduction in evidence of this particular --

"THE COURT: Well, then I take it from your remarks, Mr. Lavine, you do complain about the news coverage that --

"MR. LAVINE: I complain about both, your Honor. I complain first, that the -- that it was caused by an improper presentation in evidence of matters that are foreign to this case." (R. 2768-2771)

The court denied the motion. (R. 2776)

"MR. LAVINE: One other motion, your Honor. We wish to offer in evidence the newspaper of

last night, the evening Herald, which had the headline 'BOB HOPE'S SON "NEAR VICTIM"' 'KIDNAP CONFESSION' 'Sinatra Was Means to Wealth. Bob Hope's Son "Near Victim."' And we offer this as defendants' next in evidence for the purposes of furthering this motion and as an exhibit to our motion for mistrial.

(The exhibit was received and marked for identification)

"MR. LAVINE: So that the record may be clear, I understand your Honor denied the motion for mistrial.

"THE COURT: Well, if there is any doubt about it, let the record show that I have denied that motion." (R. 2776-2777)

XVI

THE COURT COMMITTED PREJUDICIAL ERROR IN ENTERING THE JURY ROOM AND DISCUSSING MATTERS WITH THE JURY IN THE ABSENCE OF THE DEFENDANTS AND THEIR COUNSEL AND THEN DENYING THE MOTION FOR A MISTRIAL. (R. 4025) THE PROCEDURE VIOLATED DUE PROCESS OF LAW GUARANTEED BY THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES AND ALSO DENIED THE RIGHT OF THE DEFENDANT TO A PUBLIC TRIAL IN ALL ITS PROCEEDINGS.

It appeared that at the close of the case, on the

afternoon of March 5, 1964, that Judge East had entered the jury room and talked to jurors about some newspaper article or some newspaper publicity which had appeared in connection with the case. His exact conversation does not appear in the record but he stated that he had it transcribed and sealed as an exhibit. (R. 4030)

The following proceedings took place:

"MRS. ROOT: If your Honor pleases, Mr. Lavine was prepared to argue the law on the matter, but he isn't here, so if I might fill in. I could never fill in and do what he could do, I'm sure.

"If your Honor pleases, your Honor made a statement last night to us, and the reporter reported it, of course, as a part of this record, that you had questioned the jury out of the hearing of the defendants and out of the hearing of counsel for the defendants as well as the prosecution. It was my feeling at the time that you made this announcement that at that time we should have registered our objection.

"However, I believe that a further research into the law, I do not believe that that was necessary because today is the first day that we really have the opportunity to do so.

"I personally feel, and I move this court,

that defendant Mr. Irwin and the defendant Mr. Amsler -- I see Mr. Forde is here -- move for a mistrial in that there apparently was evidence presented or obtained that should affect, might affect, possibly could affect the rights of the defendants.

"We feel that, if your Honor pleases, your talking with the jury -- and we say this most respectfully, if your Honor pleases, that it is in violation of the constitutional rights of the defendants, that they should have at least their counsel present if they not be there, and it is my feeling that they even should have had it presented -- should have had the matter recorded as far as what the jurors had to say and your Honor had to say in the presence of the defendants and counsel.

"THE COURT: I understand your motion, and there isn't any need for you to take any time to argue the legal matter about it, because I am satisfied of my course.

"Now, do you have anything further to say for the record, Mr. Lavine?

"(Mr. Lavine entered the courtroom.)

"MR. LAVINE: Yes, your Honor.

"We do not have a record of what happened, and we would like your Honor to make a record

for the purpose of our record.

"THE COURT: You will have a record of it at the end of the trial.

"MR. LAVINE: As to what occurred in the --

"THE COURT: Yes.

"MR. LAVINE -- in connection with the communication to the jury.

"THE COURT: You heard my remarks to the court reporter yesterday?

"MR. LAVINE: Yes. That is what awakened me last night, your Honor. And I want to join in Mrs. Root's motion, and I have requested this early conference so that we could have a complete record of any conference had by the court and jury outside the presence of the defendants in violation of their constitutional rights under the Fifth Amendment -- Fifth and Sixth Amendments to the Constitution, and that is the due process clause and the right of confrontation in case Mr. Sheridan wants to know what they referred to.

"THE COURT: Well, I can quite understand that if the court went to the jury and gave them some instructions or discussed any phase of the case with them, that is, the evidentiary phase of the case with them, that would be highly improper. But what I did yesterday in

connection with my conference with the jury as a whole and each one of them separately was nothing more than what the Supreme Court has directed the United States District Courts to do.

"In the event that there is some out-of-court publication which the defendant claims tends to deny him of the right of free trial and due process, that the court makes it own investigation by talking to the jury and making a record of that fact and of the substance of the conversation, and then entering his ruling. That I have done, and it is by direct command of the United States Supreme Court.

"It may well be that the majority will change, but I can't wait until that happens.

"MR. LAVINE: Our objection, your Honor, is only that it was not in the presence of the defendants or counsel or with their consent or knowledge, and --

"THE COURT: All I can say is tell you, Mr. Lavine, in that regard, is that you will have to ask the Supreme Court of the United States to change the directions to the District Court. I did nothing more than Judge Ryan did -- I beg your pardon -- Judge Curtis did in the Ryan case. He did one thing further,

he gave counsel a transcript of the examination, which I shall not do --

"MR. LAVINE: I see.

"THE COURT: -- until after the trial.

"MR. LAVINE: Your Honor made the statement early in the case that the only time the judge gets into trouble is when he doesn't hold matters in open court. With this we agree. We regret that this didn't occur in open court, and assign that as an error which we urge as an unconstitutional omission.

"Thank you, your Honor." (R. 4025-4029)

It is respectfully submitted that no judge may enter the jury room and talk privately to the jury; that to do so is a denial of public trial guaranteed by the Sixth Amendment to the Constitution of the United States. Denial of a public trial entitled a defendant to a reversal of the judgment.

Tankersley v. United States, 145 F.2d 58

It is error for the court to communicate with the jury in the absence of counsel and without notice to them.

Ah Fook Chong v. United States, 91 F.2d 805

It is error for the court to give any instructions or to discuss any matter with the jury except in the presence of the defendant and his counsel.

Lewis v. United States, 146 US 370

XVII

THERE WERE ILLEGAL SEARCHES AND SEIZURES UNDER THE FOURTH AND FIFTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

The search of Irwin's house, the taking of the bags of money without a search warrant and without a warrant of arrest, the search of the house for the taking of other moneys, were all illegal and were illegally used as against appellant Amsler, in violation of the Fourth and Fifth Amendments to the Constitution of the United States.

Mapp v. Ohio, 367 US 643, 6 L.ed.2d 1081

XVIII

THE COURT ERRED IN DENYING THE MOTIONS FOR JUDGMENTS OF ACQUITTAL.

Sinatra's admitted consent vitiated any kidnaping or obtaining the money for ransom or reward.

Appellant was therefore entitled to judgments of acquittal and the court erred in denying the same.

Rule 29, Federal Rules of Criminal Procedure

Barr v. Columbia, 12 L.ed.2d 766

Bouie v. Columbia, 12 L.ed.2d 894

Robinson v. Florida, 12 L.ed.2d 771

XIX

THE DEFENDANTS WERE TRIED UNDER AN ATMOSPHERE OF GREAT PREJUDICE AND WERE DENIED FAIR TRIAL. THE COURT ERRED IN FAILING TO GRANT A NEW

TRIAL DUE TO AN INTERVIEW GIVEN DURING THE TRIAL BY FRANK SINATRA, JR., WHICH WAS PUBLISHED IN THE LOS ANGELES TIMES ON THE MORNING OF FEBRUARY 29, 1964. (R. 2972)

On the morning of February 29, 1964, the Los Angeles Times' headline ran "SINATRA JR. DISTURBED OVER PUBLIC'S ATTITUDE" and then it commented on "People Doubt Me" and an extensive article about the matter. (R. 2973-2974)

The giving of an interview by the principal witness in the trial, during the trial, which made headlines which would necessarily be picked up by other news media, was highly prejudicial to the defense and the motion for the new trial should have been granted.

Hoffa v. United States (6th Cir.), 235 F.Supp. 611, 349 F.2d 20

In the Hoffa case, the trial judge moved the trial from one District in Tennessee to another because of the publicity.

The motion for mistrial was made by counsel on behalf of Mr. Keenan, but early in the trial it was agreed that an objection by one counsel would be applicable to all and since Amsler was charged with being a principal and participant, along with Mr. Keenan, the article was equally highly prejudicial to Mr. Amsler and a motion for mistrial (R. 2963) should have been granted. It was, of course, denied.

XX

THE COURT ERRED IN DENYING A SEVERANCE OF THE TRIAL OF AMSLER FROM THAT OF THE OTHER DEFENDANTS, TO THE GREAT PREJUDICE OF DEFENDANT AMSLER.

The court erred in denying a severance and separate trials for each of the defendants. This was of great prejudice, particularly to Amsler, in the light of the confessions and the activities of the other defendants.

The court should grant a severance where confessions of the defendants, made separately and in the absence of counsel, would prejudice each of the defendants.

See: People v. Aranda, 407 P.2d 265, 47 Cal.Rptr. 353

In the Aranda case, the court reversed a case where there were co-defendants and incriminatory statements were elicited from the co-defendants which were later used in evidence. The court in the Aranda case points out it is a fiction and a naive assumption that juries can disregard confessions or statements made by one defendant which incriminate another, and it is respectfully submitted that it was highly prejudicial in this case in view of five tape recordings secured from Irwin and used against appellant Amsler.

XXI

THE COURT ERRED IN FAILING TO PERMIT CROSS-EXAMINATION AND CONFRONTATION OF THE MONEY

AND IN FAILING TO SUPPRESS THE EVIDENCE REGARDING THE SO-CALLED RANSOM MONEY, THE DEFENSE NEVER HAVING HAD ANY OPPORTUNITY TO SEE OR EXAMINE THE SO-CALLED RANSOM MONEY, WHETHER THERE WAS ANY MONEY PURPORTEDLY FOR RANSOM. USE OF SUCH EVIDENCE VIOLATED THE DEFENDANT'S RIGHTS TO DUE PROCESS GUARANTEED BY THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

The so-called ransom money for the most part was not produced in court, but had been destroyed. Since there was never any opportunity for the defense to see or examine the so-called ransom money, its use as evidence violated defendant's rights to due process of law guaranteed by the Fifth Amendment to the Constitution of the United States.

Pointer v. Texas, 13 L.ed.2d 923

Douglas v. Alabama, 13 L.ed.2d 934

Brady v. Maryland, 10 L.ed.2d 215

Mapp v. Ohio, 367 US 643, 6 L.ed.2d 1081

XXII

THE COURT ERRED IN LIMITING THE CROSS-EXAMINATION OF ALL THREE DEFENDANTS TO ONE COUNSEL, ALTHOUGH THEY WERE SEPARATELY REPRESENTED BY SEPARATE COUNSEL. THE COURT STATED HE WOULD NOT LET ANY OTHER DEFENDANT CROSS-EXAMINE ANY FURTHER ON THE SUBJECT

MATTER ON WHICH ONE COUNSEL HAD EXAMINED. THIS WAS A DENIAL OF THE RIGHT OF CONFRONTATION OF THE INDIVIDUAL DEFENDANT AND OF CROSS-EXAMINATION BY THE INDIVIDUAL DEFENDANT.

At the outset of the trial, the court stated that only one counsel would be permitted to cross-examine a witness on a subject matter and that the other counsel could not repeat anything or cover anything covered by one counsel. He made this as a rule of procedure for the court where there were three defendants, having three separate counsel, independent of each other.

We respectfully submit that there is no such rule of procedure set forth in the federal rules of Criminal Procedure nor is it authorized, and it effectively denies each defendant effective assistance of counsel of his own choosing.

CONCLUSION

WHEREFORE, appellant prays for reversal of the judgments below and for an order dismissing the indictment for want of jurisdiction of the court and for procedural errors which denied the appellant due process of law under the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States.

In the alternative, appellant prays for reversal of the judgments, and each of them.

Dated: December 23, 1965.

Respectfully submitted,

MORRIS LAVINE

Attorney for Appellant
Joseph Clyde Amsler

CERTIFICATE OF COUNSEL

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Morris Lavine
Attorney for Appellant Joseph Clyde Amsler

STATUTES, CONSTITUTIONAL PROVISIONS, RULES AND ORDERS INVOLVED

Title 18, Section 371, U.S. Codes:

"Conspiracy to commit offense or to defraud United States.

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

"If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor."

Title 18, Section 875(a), U.S. Codes:

"Interstate communications.

"(a) Whoever transmits in interstate commerce any communication containing any demand or request for a ransom or reward for the release of any kidnapped person, shall be fined not more than $5,000 or imprisoned not more than twenty years, or both."

Title 18, Section 1201, U.S. Codes:

"Transportation.

"(a) Whoever knowingly transports in interstate or foreign commerce, any person who has been unlawfully seized, confined, inveigled, decoyed, kidnaped, abducted, or carried away and held for ransom or reward or otherwise, except, in the case of a minor, by a parent thereof, shall be punished (1) by death if the kidnaped person has not been liberated unharmed, and if the verdict of the jury shall so recommend, or (2) by imprisonment for any term of years or for life, if the death penalty is not imposed.

"(b) The failure to release the victim within seven days after he shall have been unlawfully seized, confined, inveigled, decoyed, kidnaped, abducted, or carried away shall create a rebuttable presumption that such person has been transported in interstate or foreign commerce.

"(c) If two or more persons conspire to violate this section and one or more of such persons do any overt act to effect the object of the conspiracy, each shall be punished as provided in subsection (a)."

Title 18, Section 1202, U.S. Codes:

"Ransom money.

"Whoever receives, possesses, or disposes of any money or other property, or any portion thereof, which has at any time been delivered as ransom or reward in connection with a violation of section 1201 of this title, knowing the same to be money or property which has been at any time delivered as such ransom or reward, shall be fined not more than $10,000 or imprisoned not more than ten years, or both."

Title 18, Section 3432, U.S. Codes:

"Indictment and list of jurors and witnesses for prisoner in capital cases.

"A person charged with reason or other capital offense shall be least three entire days before commencement of trial be furnished with a copy of the indictment and a list of the veniremen, and of the witnesses to be produced on the trial for proving the indictment, stating the place of abode of each venireman and witness."

Fourth Amendment, United States Constitution:

"The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no Warrants shall

issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Fifth Amendment, United States Constitution:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Sixth Amendment, United States Constitution:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the

nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence."

Article 3, Section 2, United States Constitution:

"Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; -- to all Cases affecting Ambassadors, other public Ministers and Consuls; -- to all Cases of admiralty and maritime Jurisdiction; -- to Controversies to which the United States shall be a Party; -- to Controversies between two or more States; -- between a State and Citizens of another State; -- between Citizens of different States; -- between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects."

Rule 5, Federal Rules of Criminal Procedure:

" Proceedings before the Commissioner.

"(a) Appearance before the Commissioner. An officer making an arrest under a warrant issued upon a complaint or any person making an arrest without a warrant shall take the arrested person without unnecessary delay before the nearest available commissioner or before any other nearby officer empowered to commit persons charged with offenses against the laws of the United States. When a person arrested without a warrant is brought before a commission or other officer, a complaint shall be filed forthwith.

"(b) Statement by the Commissioner. The commissioner shall inform the defendant of the complaint against him, of his right to retain counsel and of his right to have a preliminary examination. He shall also inform the defendant that he is not required to make a statement and that any statement made by him may be used against him. The commissioner shall allow the defendant reasonable time and opportunity to consult counsel and shall admit the defendant to bail as provided in these rules.

"(c) Preliminary Examination. The defendant shall not be called upon to plead. If the defendant waives preliminary examination, the

commissioner shall forthwith hold him to answer in the district court. If the defendant does not waive examination, the commissioner shall hear the evidence within a reasonable time. The defendant may cross-examine witnesses against him and may introduce evidence in his own behalf. If from the evidence it appears to the commissioner that there is probable cause to believe that an offense has been committed and that the defendant has committed it, the commissioner shall forthwith hold him to answer in the district court; otherwise the commissioner shall discharge him. The commissioner shall admit the defendant to bail as provided in these rules. After concluding the proceeding the commissioner shall transmit forthwith to the clerk of the district court all papers in the proceeding and any bail taken by him."

Rule 17, Federal Rules of Criminal Procedure:

"Subpoena.

"(a) For Attendance of Witnesses; Form; Issuance. A subpoena shall be issued by the clerk under the seal of the court. It shall state the name of the court and the title, if any, of the proceeding, and shall command

each person to whom it is directed to attend and give testimony at the time and place specified therein. The clerk shall issue a subpoena, signed and sealed but otherwise in blank to a party requesting it, who shall fill in the blanks before it is served. A subpoena shall be issued by a commissioner in a proceeding before him, but it need not be under the seal of the court.

(b) Indigent Defendants. The court or a judge thereof may order at any time that a subpoena be issued upon motion or request of an indigent defendant. The motion or request shall be supported by affidavit in which the defendant shall state the name and address of each witness and the testimony which he is expected by the defendant to give if subpoenaed, and shall show that the evidence of the witness is material to the defense, that the defendant cannot safely go to trial without the witness and that the defendant does not have sufficient means and is actually unable to pay the fees of the witness. If the court or judge orders the subpoena to be issued the costs incurred by the process and the fees of the witness so subpoenaed shall be paid in the same manner in which similar

costs and fees are paid in case of a witness subpoenaed in behalf of the government.

"(c) For Production of Documentary Evidence and of Objects. A subpoena may also command the person to whom it is directed to produce the books, papers, documents or other objects designated therein. The court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive. The court may direct that books, papers, documents or objects designated in the subpoena be produced before the court at a time prior to the trial or prior to the time when they are to be offered in evidence and may upon their production permit the books, papers, documents or objects or portions thereof to be inspected by the parties and their attorneys.

". . ."

Rule 24, Federal Rules of Criminal Procedure:

"(a) Examination. The court may permit the defendant or his attorney and the attorney for the government to conduct the examination of the prospective jurors or may itself conduct the examination. In the latter event, the court shall permit the defendant or his attorney and the attorney for the government to supplement the examina-

tion by such further inquiry as it deems proper or shall itself submit to the prospective jurors such additional questions by the parties or their attorneys as it deems proper.

"(b) Peremptory challenges. If the offense charged is punishable by death, each side is entitled to 20 peremptory challenges. If the offense charged is punishable by imprisonment for more than one year, the government is entitled to 6 peremptory challenges and the defendant or defendants jointly to 10 peremptory challenges. If the offense charged is punishable by imprisonment for not more than one year or by fine or both, each side is entitled to 3 peremptory challenges. If there is more than one defendant the court may allow the defendants additional peremptory challenges and permit them to be exercised separately or jointly.

"(c) Alternate jurors. The court may direct that not more than 4 jurors in addition to the regular jury be called and impanelled to sit as alternate jurors. Alternate jurors in the order in which they are called shall replace jurors who prior to the time the jury retires to consider its verdict become unable or disqualified to perform their duties. Alternate jurors shall be drawn in the same manner, shall have the same qualifications, shall be subject to the same examination and challenges

shall take the same oath and shall have the same functions, powers, facilities and privileges as the regular jurors. An alternate juror who does not replace a regular juror shall be discharged after the jury retires to consider its verdict. Each side is entitled to one peremptory challenge in addition to those otherwise allowed by law if one or two alternate jurors are to be impanelled and two peremptory challenges if three or four alternate jurors are to be impanelled. The additional peremptory challenges may be used against an alternate juror only and the other peremptory challenges allowed by these rules may not be used against an alternate juror."

Order of the United States District Court for the Southern District of California, dated February 14, 1951, filed February 28, 1951:

"UNITED STATES DISTRICT COURT
"SOUTHERN DISTRICT OF CALIFORNIA

IT IS HEREBY ORDERED BY THE COURT that neither the Clerk nor the Marshal shall reveal to anyone the names or addresses of persons

called for jury duty, or jurors, except (1) Upon prior order of court, or (2) Where required to do so by any applicable law, or (3) When done in connection with the summoning of or notification to jurors, or as certified in vouchers for payment of jury fees.

"Dated: February 14, 1951.

"PAUL J. McCORMICK
"United States District Judge

"LEON R. YANKWICH
"United States District Judge

"C.E. BEAUMONT
"United States District Judge

"BEN HARRISON
"United States District Judge

"F I L E D

"PEIRSON M. HALL
"FEB 28 1951 "United States District Judge

"EDMUND L. SMITH, "WM. C. MATHES
"Clerk "United States District Judge

"JACOB WEINBERGER
"United States District Judge

"HARRY C. WESTOVER
"United States District Judge

"JAMES M. CARTER
"United States District Judge

"WM. M. BYRNE
"United States District Judge"

Order of the United States District Court for the Southern District of California, dated January 20, 1964, filed January 20, 1964.

"UNITED STATES DISTRICT COURT

"SOUTHERN DISTRICT OF CALIFORNIA

"In the Matter of Photographing, Broadcasting, Telecasting in Courtrooms, et cetera.	)	ORDER

F I L E D
JAN 20 1964
Clerk, U.S. District Court, Southern District of California
By E. Drew, Deputy

WHEREAS, the Judicial Conference of the United States, at its meeting on March 8-9, 1962, adopted the following resolution (Report of the Judicial Conference of the United States proceedings March 8-9, 1962):

> "Resolved, That the Judicial Conference of the U.S. condemns the taking of photographs in the courtroom or its environs in connection with any judicial proceedings, and the broadcasting of judicial proceedings by radio, television, or other means, and considers such practices to be inconsistant with fair judicial procedure and that they ought not to be permitted in any federal court."

and,

"WHEREAS, said Resolution enlarges the provisions of Federal Rules of Criminal Procedure,

Rule 53, prohibiting photographing, broadcasting and televising in courtrooms during the progress of judicial proceedings so as to include not only criminal but also civil proceedings, and so as to exclude photographing, broadcasting and televisint not only from the courtrooms, but also from its 'environs'; and

"WHEREAS, Canon 35 of the American Bar Association provides in part as follows:

> 'Proceedings in court should be conducted with fitting dignity and decorum. The taking of photographs in the courtroom during sessions of court, recesses, or between sessions, and the broadcasting or televising of court proceedings are calculated to detract from the essential dignity of the proceedings, distract the witness so that his testimony degrades the court and creates misconception with respect thereto in the minds of the public, and should not be permitted.'

and

"WHEREAS, this Court requested clarification of the above quoted Resolution of the Judicial Conference of the United States as it may affect Naturalization proceedings and

was advised that this matter had specifically been considered and that the Resolution did not exclude Naturalization proceedings, even though American Bar Association Canon 35, in a portion not quoted, excepted such proceedings from the Canon; and

"WHEREAS, subsequently thereto the Judicial Conference of the Ninth Circuit requested an amendment to the Resolution to permit "news media" courtroom photography or telecasting of naturalization and ceremonial matters to be had in accordance with local rule of court, which request has not yet been acted upon; and

"WHEREAS, in order to avoid misunderstanding with representatives of news media, it appears necessary to clarify the subject of photography, telecasting and broadcasting from or in the courts and environs in order to conform to the standards set by the Judicial Conference of the United States;

"NOW, THEREFORE, IT IS HEREBY ORDERED that all forms, means and manner of taking photographs, or broadcasting or televising on or from the entire second floor or any part thereof, and Hearing Rooms No. 1 and No. 2 and corridors leading thereto on the Main Street

Floor, of the United States Post Office and Court House Building, located at 312 North Spring Street, Los Angeles, California, are hereby prohibited during the course of, or in connection with, any judicial proceedings, whether court is actually in session or not.

"Dated: January 20, 1964.

"Peirson M. Hall
"Peirson M. Hall, Chief U.S. District Judge

"Leon R. Yankwich
"Leon R. Yankwich, U.S. District Judge

"Wm. C. Mathes
"Wm. C. Mathes, U.S. District Judge

"Harry C. Westover
"Harry C. Westover, U.S. District Judge

"James M. Carter
"James M. Carter, U.S. District Judge

"Wm. M. Byrne
"Wm. M. Byrne, U.S. District Judge

"Thurmond Clarke
"Thurmond Clarke, U.S. District Judge

"---------- (Absent)
"Fred Kunzel, U.S. District Judge

"M.D. Crocker
"M.D. Crocker, U.S. District Judge

"Albert Lee Stephens, Jr.
"Albert Lee Stephens, Jr., U.S. District Judge

"Charles H. Carr
"Charles H. Carr, U.S. District Judge

"Jesse W. Curtis
"Jesse W. Curtis, U.S. District Judge

"E. Avery Crary

"E. Avery Crary, U.S. District Judge"

Chapter II, Rule 3, Local Rules, United States District Court for the Southern District of California, Central Division:

"NEW RULES GOVERNING ASSIGNMENT.

"Rule 3. The criminal calendar of the central division.

"It is Ordered:

"(1) All criminal cases and proceedings filed in the Central Division of this Court shall be assigned to a Judge of the Central Division, other than the Chief Judge, in the order of seniority to begin with Judge Harry C. Westover who is hereby assigned as such Judge until January 1, 1962.

"(2) The Judge of the Criminal Department shall preside over the criminal calendar for a period of a calendar year, to be followed, for a like period, by another Judge in the order of seniority, excluding the Chief Judge and Judges assigned regularly to the Northern and Southern Divisions of the District.

"3(a) Each Judge to whom is assigned the criminal calendar shall hear all arraignments,

pleas, motions and proceedings other than trials, provided that when a case has been transferred from the Criminal Department, and a superseding or other indictment or information relating to the same case is filed, all arraignments, pleas, motions and other proceedings shall be heard by the Judge to whom the original case was transferred.

"(b) When a plea of guilty or nolo contendere is entered, the Judge in the Criminal Department shall retain the case for disposition and sentence.

"(c) When a plea of not guilty is entered, the Judge in the Criminal Department shall transfer the case, in the order now employed by the Clerk of this Court in assigning civil cases to the Judges upon filing, to another Judge regularly assigned and sitting full time in the Central Division, other than the Chief Judge and himself, for setting on his own calendar.

"(d) The Judge in the Criminal Department may also transfer to another Judge, in the manner herein provided, the hearing of motions or proceedings, in any case, when he is of the view that the matter involves questions of law or fact which should be deter-

mined by the Judge who is to try the case. He may also take over for trial from another Judge any criminal case, if both Judges so agree.

"(4) The Judge in the Criminal Department is hereby empowered during his incumbency, to transfer, in the manner provided in 3(c) and 3(d) hereof, motions or matters and cases for trial to the Judges regularly assigned and sitting full time in the Central Division, other than the Chief Judge, each of whom shall accept the motions, matters and cases so transferred, unless he is disqualified.

"(5) When a plea of not guilty has been entered and the Clerk has opened the venelope to remove the card indicating the name of the transferee Judge, all further proceedings, including a change of plea, shall be before the transferee Judge.

"(6) Whenever the Judge in the Criminal Department is unable, for any period of time, because of illness, disability, unavoidable absence or other justifiable causes, to perform his duties, he is authorized to arrange with any other Judge of the District for the performance of his duties. Should he fail or be unable to do so, the Chief Judge may

designate another Judge to perform such duties during such period of inability or disability.

"(7) Rule III of the 'Rules Governing Assignment' (the text of which is printed on pages 43 and 44 of the Printed Rules of this Court) is hereby rescinded in its entirety.

"(8) The Order of the Judges of this Court dated April 4, 1960, filed April 11, 1960, entitled 'Civil Case Credit for Short Criminal Cases,' is hereby also rescinded in its entirety.

"(9) Rule II of the 'Rules Governing Assignment' (the text of which is printed on page 42 of the Printed Rules of this Court) is hereby amended by striking the word 'civil' wherever it occurs in that Rule, including the Title thereof."

INSTRUCTIONS GIVEN BY THE

COURT RE CONSPIRACY

(The following instructions given by the court on the subject of conspiracy are taken from pages 4233-4242 of the reporter's transcript.)

"In connection with Count Two, you are instructed that an act of Congress provides: 'If two or more persons conspire either to commit an offense against the United States and any one or more such persons do any act to effect the object of the conspiracy, each shall be guilty of a crime.'

"Members of the jury, you are instructed that a conspiracy may be defined as a combination of two or more persons who, by concerted action, seek to accomplish a criminal or unlawful purpose or to accomplish some purpose not in itself unlawful or criminal but by unlawful or criminal means. The gist of the offense is the unlawful combination or agreement to violate the laws of the United States, followed by an overt act in furtherance of an object of the conspiracy. From this definition, you will observe that there are three essential and necessary elements of a criminal conspiracy: First, an agreement or understanding by two or more persons which contemplates their concerted action.

"Two objectives of such agreement or understanding, one or more of which, if accomplished, would constitute a criminal offense against the United States. Third, the

performing of one or more overt acts furthering such objective by one or more of the members of the conspiracy.

"It then follows that in order for the Government to establish and for you to convict any of the defendants of the conspiracy charged in Count One it is necessary for the Government to prove to you by satisfactory evidence byond a reasonable doubt each of the following four material and essential elements of the alleged crime of conspiracy as charged.

"These elements are: First, that the conspiracy described was formed and this is at or about the time alleged; two, that the defendants knowingly and willfully became members of the conspiracy; that is, any two or more of the defendants; three, that one of the conspirators thereafter knowingly committed at least one of the overt acts charged in the indictment at or about the time and place alleged; and, fourth, that such overt act was committed in furtherance of some object or purpose of the conspiracy as charged.

"If you find from the evidence beyond a reasonable doubt that the existence of the conspiracy as charged has been proved and that during the existence of the conspiracy one of the overt acts alleged was knowingly done by one of the conspirators in furtherance of some object or purpose of the conspiracy as charged, proof of the conspiracy offense charged has been complete. And it is complete as to every person found by you to have been know-

ingly and willfully a member of the conspiracy at the time the overt act was committed, regardless of which of the conspirators did the overt act.

"To constitute a conspiracy it is not necessary that the persons involved should meet together and enter into an explicit or formal agreement for an unlawful scheme, or that by written or spoken word that they should directly state what their unlawful scheme is to be.

"The details of the plan and the specific means by which the unlawful scheme is to be made effective, it is sufficient if two or more of the defendants in any manner or through any contrivance impliedly or passively come to a mutual understanding to accomplish a common and unlawful design knowing and specifically intending the accomplishment of one or more criminal objectives thereof, and that pursuant to such understanding one or more of such defendants committed one or more of the overt acts in furtherance of the conspiracy.

"Where an unlawful objective is sought to be effected by two or more persons actuated by common purpose and intent of accomplishing that end, and they work together in any way in furterhance of the unlawful scheme, every one of such persons become a member of the conspiracy, however important, dominant or minor the part of each may be or whether it be executed together or at a remote distance from the other activities of other conspirators.

"All of the conspirators need not have originally

conceived the conspiracy or participated in its conception. Those who join in a previously existing conspiracy with knowledge and specific intent to accomplish an unlawful objective, and who cooperate in the common effort to that end become parties to the conspiracy.

"All of the conspirators need not be acquainted with all others or know all others that may be involved. They may not have previously associated together. If persons act together to accomplish unlawful objectives, a conspiracy is shown even though the individual conspirators may have done acts in furtherance of the common unlawful design apart and unknown to the other conspirators.

"Of course, mere personal or business association with members of a conspiracy by a defendant standing alone would not establish participation in the conspiracy by such a defendant.

"Any persons entering into a conspiracy subsequent to its formation with knowledge of its existence and objectives are regarded in law as parties to all of the acts done by any of the other parties before or after in furtherance of the common design.

"Persons may be guilty of being parties to a conspiracy even though it be unsuccessful and the objects of the conspiracy never be accomplished. On the other hand, proof concerning the success of a conspiracy and the accomplishments of its objects may be persuasive evidence of the existence of the conspiracy itself.

"Although the conspiracy count charges various means were used to accomplish the alleged conspiratorial object -- objectives, it is not incumbent upon the Government to prove that all of the means set out in the conspiracy count were in fact agreed upon to carry out the conspiracy or that all of them were actually used or put into operation. It is sufficient if it be established beyond a reasonable doubt that one or more of the means described in the indictment was agreed upon to be used to effect the conspiracy.

"A conspiracy is not ended so long as the evidence showed an intention of the conspirators to continue it, even though there may be intervals between the actions furthering the same conspiracy. Each alleged conspirator who is the agent of the other conspirator at all times during the life of the conspiracy remains an agent during all of its existence.

"Once a conspiracy has been shown to exist, it is presumed to continue until its object is accomplished or it is otherwise terminated by a withdrawal by a conspirator as to himself.

"Once it is determined beyond a reasonable doubt that a defendant is a member of the conspiracy he is presumed to continue as a conspirator until he disassociates himself from the conspiracy by means of an affirmative acts of withdrawal.

"Mere temporary inactivity or lack of enthusiasm by

a member of an existing conspiracy standing alone is not sufficient to constitute a withdrawal of such member from the conspiracy.

"In this case, particularly, you were instructed and you are instructed again that if you find any one of the defendants if he were a conspirator voluntarily surrendered himself to the authorities that would be a withdrawal from any conspiracy that you may have found him to be associated with.

"And you are further instructed that if any one or more of the defendants were a member of a conspiracy; that is, if you so find, then you are instructed that his arrest or his apprehension by the authorities would effectuate his withdrawal from any such conspiracy.

"In considering whether or not each particular defendant was a member of the conspiracy, you must do so without regard to and independently of the statement or declarations of other co-conspirators. That is to say, you must determine the issue as to each defendant's membership in the conspiracy from the evidence of his own statements, declarations, actions and conduct.

"You will recall that during the trial it was emphasized from time to time that the testimony concerning acts and statements made by one alleged co-conspirator in the absence of other defendants or alleged co-conspirators was received in evidence on a conditional or tentative basis. The testimony concerning such acts,

declarations or admissions was received in evidence at the time only against the particular person making such.

"However, with respect to the defendants who were not present, such testimony was received subject to independent proof of the existence of the conspiracy, and such absent defendant's knowing participation in the conspiracy.

"In other words, the alleged participation by a defendant in a conspiracy cannot be established against him by evidence of the acts or declarations of any of his alleged co-conspirators done or made in his absence.

"The defendants' connection with a conspiracy must be established by independent proof based upon direct evidence and upon reasonable inferences to be drawn from the evidence of such defendant's own action, his own conduct, his own statements or declarations and his own connection with the action and conduct of the other co-conspirators.

"Each defendant's acts and declarations may be evidence of his own connection with a conspiracy, and the conspiracy itself may be proved by the sum total of the independent acts and declarations of all of the alleged participants.

"If and when the existence of the conspiracy charged in the conspiracy count and the membership of any two or more of the defendants in such conspiracy has been found, then the acts done and the statements or declarations made by any person found by you to be a member of the conspiracy

at the time may be considered in connection with the case as to any defendant whom you find to have been a member of the conspiracy at the same time, even though such acts and declarations may have been made in the absence and without the knowledge of such defendant, provided such acts were done and such statements or declarations were made during the continuance of such conspiracy and in furtherance of an objective or purpose of the conspiracy.

"So, if you conslude from the evidence that any two or more of the defendants were a member of the conspiracy, and you do so based upon the evidence, the independent evidence concerning the acts and statements of the particular defendant, as you have already been told, you may then consider it as made by him any statement or declaration of other members of the conspiracy even though they were not named as defendants in the indictment, provided such statements or declarations were made during the existence of the conspiracy and in furtherance of an object or purpose of the conspiracy as charged in the conspiracy count.

"A statement or act to be made in furtherance of a conspiracy must be made during the existence of a conspiracy. If you should determine that certain acts or conversations took place either before the commencement of the conspiracy or after its termination, if there was a conspiracy, you may consider such acts or statements only as against the person making such statements or

performing such acts.

"Now, finally, in connection with the conspiracy count, in order to sustain a conviction of any defendant on the conspiracy count you must find that at least one of the overt acts charged in the indictment was committed by at least one of the conspirators within the Southern District of California. And in that connection you are instructed as a matter of judicial notice that the Los Angeles-Santa Monica area and the Canoga Park area in the Valley referred to in the testimony is within the Southern District of California and that such overt act advanced the objects of the conspiracy.

"It is not necessary that you find either that all defendants committed an overt act or that all alleged overt acts were in fact committed.

"If it appears from the evidence beyond a reasonable doubt that the conspiracy was knowingly and willfully formed by any two or more of the defendants as charged, and that such two or more defendants knowingly and willfully became members of the conspiracy at the inception of the plan or the scheme, or afterwards, and that afterwards one or more of the conspirators knowingly committed in furtherance of an object or purpose of the conspiracy one or more of the overt acts charged, then the success or failure of the conspiracy to accomplish the common object or purpose if immaterial.

"By the term 'overt act' is meant any act committed

by any one of the conspirators in an effort to effect or accomplish some object or purpose of the conspiracy. The overt act in and of itself need not be criminal in nature if considered separately and apart from the conspiracy. It may be as innocent as the act in and of itself of a man walking across the street or driving an automobile. It must, however, be an act which follows and tends towards accomplishment of the plan or scheme, and it must be knowingly done in furtherance of some object or purpose of the conspiracy charged in the conspiracy count."

INSTRUCTION GIVEN BY THE JUDGE RE KIDNAPING AND CONSENT, WHICH INVADED THE PROVINCE OF THE JURY AS THE FINDER OF THE FACT

(The following instruction given by the court is taken from pages 4244-4247 of the reporter's transcript.)

"Members of the jury, this Act of Congress referred to 'a person who had been unlawfully seized or kidnaped or carried away.' In this connection you are instructed that an unlawful seizure or kidnaping of a person means the act or acts of a persons of holding a seized person for a proscribed purpose, and this necessarily implies an unlawful physical or mental restraint for an appreciable period of time against the victim's will and consent and with willful intent on the part of the actors so to confine the victim. In connection with the defendants' theory, you are instructed that if you find from the evidence in this case that the act of alleged kidnaping as charged in count 2 was prearranged by Frank Sinatra, Jr., or any person on his behalf for publicity, advertising, or otherwise, you must acquit the three defendants on the conspiracy charge to violate the kidnaping laws of the United States and of the kidnaping of Frank Sinatra, Jr., as charged in count 2.

"In connection with this phase of the defendants' theory, you are advised that there is no direct evidence in this case to the effect that Frank Sinatra, Jr., or any

person on his behalf ever made any prearrangement with any of the defendants or, for that matter, with any person for his false abduction and holding for ransom for publicity or for any other purpose. I suggest to you that you have only the statement of the defendants' counsel in this regard. Particularly you are advised that the testimony of Amsler and Irwin to the effect that Keenan had told them at a time prior to the alleged abduction and kidnaping that Frank Sinatra, Jr., had known about it or was in on it or words to that effect must be considered by you with care and caution for the reason that such hearsay testimony is not evidence and cannot be considered by you as tending to prove the truth of the substance of Keenan's claimed statements to Amsler or Irwin. In that regard, you may consider such testimony only so far as you should find that it tends to reavel to you the belief or intent on the part of Amsler or Irwin respectively in connection with their acts and doings as revealed to you by their testimony and the evidence on behalf of the government.

"As noted to you, one of the special ingredients of the alleged crime of unlawful kidnaping as charged in count 2 is the lack of free will consent on the part of the alleged victim Frank Sinatra, Jr., to be taken, transported, and removed from one State to another for the purpose of ransom. Therefore, when one in the exercise of his own free will and with knowledge of what is taking

place with respect to his person voluntarily and willingly consents to accompany another, the latter cannot be guilty of kidnaping the former so long as such condition of free will consent exists. And in this connection you are instructed that a voluntary or free will consent on the part of any person may be expressly or impliedly given by him.

"It has been pointed out to you that Frank Sinatra, Jr., in answering some of the defense counsel's questions, stated in effect he consented to the acts and conduct of the defendants Keenan and Amsler of taking him from his room and transporting him. I point out to you that Frank Sinatra, Jr., also stated that he cooperated or complied with the defendants' requests.

"Members of the jury, it is for you to interpret these expressions of language and determine therefrom your interpretation of whether Frank Sinatra, Jr., acknowledged or expressed a free will consent to be taken and transported as revealed in the evidence or he was then acting under some physical or mental restraint.

"You as trial jurors may or you may not find a free will consent to have been impliedly given from action as well as inaction on the part of Frank Sinatra, Jr., when such action or inaction, as the case may be, and as found by you on the part of Frank Sinatra, Jr., is viewed in the light of all of the surrounding facts and circumstances and with reason and common sense.

"If you find from the evidence that one or both of the defendants Keenan and Amsler threatened Frank Sinatra, Jr., at any given time with a pistol or pistols in a menacing manner or made commands or threats therewith, then you as trial jurors may, if you wish, infer from such menacing use or verbal threats of shooting, pistol or pistols, if any, that the pistol or pistols were loaded with bullets and being then capable of causing bodily harm. And I would comment that you could infer, if you wish, that Frank Sinatra, Jr., so inferred and acted accordingly."

DEFENSE OBJECTIONS TO INSTRUCTIONS

GIVEN BY THE COURT

(The following objections by the defense to instructions given by the court are found on pages 4279-4288 of the reporter's transcript.)

"THE COURT: Defendant Keenan may proceed with his exceptions.

"MR. CROUCH: Yes, your Honor. Your Honor, I would first like to renew all our general objections to the admission of the instructions that we discussed yesterday, but I -- the one thing that does worry me, your Honor, is your Honor's early comments on the evidence in regard to threats, guns, intimation. I think your Honor, at the time he made this -- these comments to the jury informed them that these were comments of your Honor and that they were to -- if I remember correctly, were to utilize them as inferences only.

"Now, as a practical matter, your Honor, I don't think at that stage of the charge to the jury, first, that the jury really understands what an inference is. Secondly, I don't think that at that stage, your Honor, that they really understand the distinction between instructions on your part and comments from his Honor. And I think your Honor in making the comments he did has invaded the province of the jury, because I think these are facts which would be -- should be left entirely to the jury and not be commented on by your Honor.

"Your Honor has commented several times and, correctly, to the jury that they are the sole judges of the facts. But I feel, your Honor, that you have invaded the province of the jury by making those comments.

"THE COURT: No. It's not invading their province to say or suggest to them that they might draw that inference if they wish. That's all I say. But you may have your exception.

"MR. CROUCH: Thank you.

"MR. LAVINE: Your Honor, I reserve all of the exceptions to the instructions which I offered and which your Honor rejected heretofore. That is the first matter that I want to preserve.

"Now, coming to the same matter that Mr. Crouch discussed, I respectfully state that your Honor's comments were as unfair in that they did not give two sides of the matter. The law in respect to a judge's comments in the Federal Court, as I understand it, is that the judge must give both sides of the matter if he comments at all.

"THE COURT: What did I leave out?

"MR. LAVINE: Well, you commented about the pistol but you did not comment that the defendants contend that this was all a play, that it was according to a script and that it was the defendants' contention that this was only a part of a -- a plan of a hoax or publicity.

"Your Honor left out the defendants' side of it in giving any comments at all. Your Honor did not say at the

outset of those comments that they were -- that they were not instructions. Your Honor started out and said that you would -- did differentiate between instructions and advice, and then your Honor went on, and the jury got these, apparently, as instructions. They couldn't help but feel that way about it as your Honor gave them. So, that's my objection to that. I respectfully request your Honor to inform the jury that this was merely a suggestion or advice and not an instruction as you had heretofore defined it.

"THE COURT: I will certainly caution them again on that regard.

"MR. LAVINE: Now, the next point that I wish to point out also is that you also stated that there was no evidence that Frank Sinatra, Jr., had in any way had any previous knowledge or had --

"THE COURT: Prearrangement.

"MR. LAVINE: -- any matter in connection with it except the statements that were made by Mr. Amsler and Mr. Irwin, and that those were hearsay statements. And I respectfully submit that that was an unfair comment, that the jury had a right -- has a right to infer from all of the evidence whether, in fact, those matters did occur. That was the testimony of Mr. Amsler and Mr. Irwin, and they -- and the jury has a right to determine if it is hearsay or if they had a right to rely on it, and I respectfully submit that was an unfair comment that

invaded the province of the jury. I ask your Honor also to instruct the jury that that was only a comment. Also, that your Honor comment -- discuss that that is only a comment and not an instruction to the jury.

"THE COURT: You may have an exception.

"MR. LAVINE: Also, that the circumstances and conditions and all the facts in the case can override and form the basis of an inference which the jury itself can form from all of the evidence.

"THE COURT: Oh, I certainly told them that.

"MR. LAVINE: All right. You didn't mention it was a comment, your Honor, in your matter.

"Now, I also respectfully request to your Honor in connection with counts 3, 4, 5 and 6, if the jury finds the defendants not guilty as to counts 1 and 2, there would be no basis for their coming to a verdict of guilty in counts 3, 4, 5 and 6. Those counts depend upon a kidnaping.

"THE COURT: No, not necessarily.

"MR. LAVINE: Well, this is my contention, your Honor, that it does. And if there is -- your instruction on counts 3, 4, 5, and 6 --

"THE COURT: I would suggest to you that if they should find not guilty verdicts on counts 1 and 2 and then find a guilty verdict on the others, that would be the appropriate time to raise your question.

"MR. LAVINE: Well, no, your Honor, because I think

they are entitled to be instructed that one of the elements in counts 3, 4 and 5 -- let's take those three counts -- must be that there must be a kidnaping.

"THE COURT: I certainly told them that.

"MR. LAVINE: Well, I did not follow your instruction to that extent. Your Honor simply said that the elements were that there must be a transmission of an interstate communication and also a demand or a request for release of a person for ransom or reward, but that doesn't mean that they necessarily have to be kidnaped. In other words --

"THE COURT: Let me read to you the elements which you have had a copy of all the time. They are as follows, three elements: First, the knowing transportation in interstate commerce of a person, namely, Frank Sinatra, Jr., who had been unlawfully seized or kidnaped and carried away and held for ransom.

"MR. LAVINE: Also as to count 6, the same point, your Honor. I would -- now, I am also --

"THE COURT: I would submit to you that in count 6, there might be a question for you to raise in the event of inconsistent verdicts. But on the other hand, assuming that there was never a kidnaping, that the representation was made over the phone to Frank Sinatra, Sr., and he sent the money and it was acquired and spent --

"MR. LAVINE: Well --

"THE COURT: No, I don't follow you. You may have

your exception.

"MR. LAVINE: All right.

"MR. CROUCH: I think that might be a crime, your Honor, but I don't think it would be receipt of ransom money.

"THE COURT: Let's wait until we get into inconsistent verdicts.

"MR. CROUCH: All right.

"MR. LAVINE: Now, if your Honor pleases, at the outset of your Honor's remarks to the jury, your Honor stated that insofar as your Honor's instructions were concerned, that if they were erroneous, there was an ample remedy by way of appeal.

"THE COURT: Yes.

"MR. LAVINE: Now, I don't think the question of appeal is a matter for this jury to have before it in any event. It is not to influence their verdict if there is an appeal on a question of law. They are the determinators of the facts. They are the ones that determine the facts. And I respectfully ask your Honor to tell them that they are in no way concerned with -- they must follow your Honor's instructions as the law of this court and not be concerned on the --

"THE COURT: That is just a matter of emphasis in my opinion of recalling to them that they should follow them. They might think the court is wrong like you, and wouldn't follow them. Therefore --

"MR. LAVINE: Well, I don't want them to think that an appeal has anything to do with their verdict. That is the main point.

"THE COURT: I am sure that they are not misled on that.

"MR. LAVINE: Well, the other point that I wish to make, your Honor, is on the question of the confessions. There was no instruction given by your Honor that if they find that if the matters obtained by confession were illegally obtained, that the matters elicited on cross examination from those alleged confessions --

"THE COURT: No, that is a matter of law that is on my shoulders.

"MR. LAVINE: Well --

"THE COURT: They are not concerned with that at all.

"MR. LAVINE: Well, I am asking your Honor to give that instruction to the jury.

"THE COURT: Yes. It will be denied, and you may have your exception.

"MR. LAVINE: All right. Then on the question of the confession of Irwin, Mrs. Root has asked me to call this to your Honor's attention: That if they find that that is not a confession but an interpretation by the arresting officer, that they can so determine.

"THE COURT: The request for further instructions will be denied.

"MR. LAVINE: Now, your Honor, also on the question

of reasonable doubt, there has been considerable question about the instruction in the language that your Honor gave it. I think the Supreme Court had it up a term or two ago, and I want to take exception to the instruction that your Honor gave in the form that you gave it.

"THE COURT: You certainly may have your exception.

"MR. LAVINE: All right.

"THE COURT: Now, if the Supreme Court would just give us a definition for reasonable doubt, we wouldn't have any trouble.

"MR. LAVINE: Well, I appreciate that. They have discussed it, but have not concluded what should be given.

"I do ask your Honor to give the jury this additional instruction which is in Form 4 of the 20 Federal Rules Decisions, just this one paragraph, and I can hand it up to your Honor.

"THE COURT: I don't have that particular one or any cross reference to it.

"MR. LAVINE: I can't mark it, but it is the third paragraph.

"THE COURT: 'A reasonable doubt may not only arise from the evidence produced but also from the lack of evidence.'

"MR. LAVINE: Yes, your Honor.

"THE COURT: I gave that.

"MR. LAVINE: Not entirely, your Honor. You gave that one sentence, but the rest of it I did not hear your

Honor give that; that the defendant may rely on matters brought out on cross examination and so forth. I thought I heard all that you gave. It is just that one paragraph. I didn't hear the rest of it, your Honor. I don't know --

"THE COURT: I told them that all of the evidence in the case was -- I have no desire not to give this to them. I don't think it is -- I think it has been covered. But if you request it, I will give it to you.

"MR. LAVINE: Yes, your Honor. That is all I have."

DEFENDANTS' PROPOSED JURY

INSTRUCTIONS REJECTED BY THE COURT

(The following jury instructions proposed by the defendants were rejected by the court.)

"DEFENDANTS' PROPOSED INSTRUCTION NO. 1

"If you find that Frank Sinatra, Jr., consented and volunteered to be transferred from the State of Nevada to the State of California and that his acts of transportation were voluntary, you must find the accused not guilty." (C.T. 117)

"DEFENDANTS' PROPOSED INSTRUCTION NO. 2

"One of the essential elements of the crimes charged in this indictment is lack of consent on the part of the alleged victim, Frank Sinatra, Jr., to be taken, transported and removed from one state to another for the purpose of ransom. If you find that he consented and was a part of the plan, then you must acquit the accused." (C.T. 118)

"DEFENDANTS' PROPOSED INSTRUCTION NO. 3

"If you believe that Frank Sinatra, Sr., put up $240,000.00 in money for the purposes of getting publicity for his son and not for ransom, you must acquit the accused." (C.T. 119)

"DEFENDANTS' PROPOSED INSTRUCTION NO. 4

"Consent may be express or implied, and it may be implied from action as well as inaction.

"Sorrells v. United States, 57 Fed.2d 973"

(C.T. 120)

"DEFENDANTS' PROPOSED INSTRUCTION NO. 5

"Consent may be proved directly or indirectly, specifically or by inference. In this connection the accused may rely not only upon the direct testimony in the case, but on all proper inferences and circumstances surrounding it, whether produced by themselves or through witnesses for the government.

"Sorrells v. United States, 57 Fed.2d 973"

(C.T. 121)

"DEFENDANTS' PROPOSED INSTRUCTION NO. 6

"The absence of consent is an element which the government must prove in this case beyond a reasonable doubt. If, therefore, in the evidence as you have heard it the defense has created a reasonable doubt in your mind as to the absence of consent, you must acquit the accused.

"Sorrells v. United States, 57 Fed.2d 973"

(C.T. 122)

DEFENDANTS' PROPOSED INSTRUCTION NO. 7

"In this case, the element of specific intent to commit a crime is essential before you can convict. If you find that the transactions were youthful pranks and not a crime, you must acquit the accused.

"Sorrells v. United States, 57 Fed.2d 973"

(C.T. 123)

DEFENDANTS' PROPOSED INSTRUCTION NO. 8

"There are certain types of crimes where the want of consent of the person affected is an essential element of the crime. The crime charged here of conspiracy to commit kidnapping is such an offense. If you find that there was consent, or if the evidence in this case raises a reasonable doubt in your mind as to whether there

was consent or that indicement to carry out the transaction supplies the consent, you must acquit the accused.

"Sorrells v. United States, 57 Fed.2d 973"

(C.T. 124)

DEFENDANTS' PROPOSED INSTRUCTION NO. 9

"Consent will, as a matter of law, neutralize the otherwise criminal quality of the acts charged.

"Sorrells v. United States, 57 Fed.2d 973 at 974"

(C.T. 125)

DEFENDANTS' PROPOSED INSTRUCTION NO. 10

"In the case involved here, the want of consent of the person affected is an essential element of the crime and if you find in this case that Frank Sinatra, Jr., consented, either directly or induced the action committed, you must find the accused not guilty.

"Sorrells v. United States, 57 Fed.2d 973 at 974"

(C.T. 126)

"DEFENDANTS' PROPOSED INSTRUCTION NO. 11

"If you find that there was arrangement and consent by Frank Sinatra, Jr., to the transactions involved, you must find the accused not guilty.

"Sorrells v. United States, 57 Fed.2d 974"

(C.T. 127)

"DEFENDANTS' PROPOSED INSTRUCTION NO. 12

"If you find in this case that the acts charged were prearranged for publicity or advertising or otherwise than for ransom or reward, you must acquit the accused.

"Sorrells v. United States, 57 Fed.2d 973"

(C.T. 128)

"DEFENDANTS' PROPOSED INSTRUCTION NO. 13

"You are instructed that the defendants assert that the statements obtained after their arrest were obtained illegally through long detention, through late questioning, through the absence and denial of counsel and through other methods which are forbidden in the federal practice. It is for you to determine whether such statements were obtained after the arrest of the defendants in violation

of their constitutional rights and if you find that they were so obtained, then you must totally disregard such statements so obtained.

"Wilson v. United States, 162 US 623

"United States v. Lydecker, 275 F. 976, 978

"Lisenba v. California, 314 US 219, 86 L.ed. 166

"Reck v. Pate, 367 US 433, 440, 6 L.ed.2d 948, 953

"Chambers v. Florida, 309 US 227, 84 L.ed. 716

"Blackburn v. Alabama, 361 US 199, 206, 4 L.ed. 2d 242

"Turner v. Pennsylvania, 338 US 62, 93 L.ed. 1810"

(C.T. 129)

"DEFENDANTS' PROPOSED INSTRUCTION NO. 21

"Kidnapping in its ordinary sense and as it applies to this case is defined as the consideration paid for the release of a person or property captured or detained. If money or property, or any part of it, was put up to secure publicity for Frank Sinatra, Jr., and was not for the purpose of securing the release of Frank Sinatra, Jr., then you must acquit the accused."

(C.T. 137)

DEFENSE COUNSELS' ARGUMENT RE
SUBPOENA ISSUED BY THE DEFENSE
FOR FRANK SINATRA, SR.

(The following argument is taken from pages 2978-2983 of the reporter's transcript.)

"MR. LAVINE: ... We have in good faith requested Frank Sinatra, Sr. to be here because he is vital to determine the purpose of the money which was put up. This is one of the great issues in this case, if your Honor pleases, whether it was put up actually for ransom or reward or for some other purpose of whether it was put up for publicity or whether it was put up as some other scheme or device to advance the interest of Frank Sinatra, Sr. and Frank Sinatra, Jr. This is the area which we had hoped to go into, but since counsel has made a statement as to an abuse of process, we answer it.

"We think maybe the abuse of process is by the complainants in this case or by his clients or his son, and this is what we desire to explore.

"Now, we are prepared to go into the issue, and I was prepared to go into the issue of how this money was raised. I told your Honor that matter before. I wanted to know what the transactions were, when he first learned of this alleged kidnaping, when he first started negotiating, what he said, what he did, and what has been done subsequently with reference to Mahoney, his publicity man, and all of the circumstances with reference to it. We

have a defense, your Honor, that we have presented in our opening statement, and we have a right to present our case in accordance with our defense. We are not responsible for business trips or other matters that parties in this case may take.

"We did not know that Mr. Sinatra, Sr. was going to Japan. We have every consideration of any witness that may come up, but we have a duty to our client to present our client's -- and I am speaking now for other counsel, also, as to the circumstances regarding this entire transaction.

"The first count and Count VI charges -- and Count II charges that money was secured for ransom or reward, I haven't yet heard and I have yet been able -- unable to connect the particular monies involved, and I asked questions last week of one of the witnesses for the Government which your Honor allowed me to ask and which were highly proper and necessary as to the conversations which took place with reference to the securing of this $239,985.

"Now, I have a right to determine the state of mind of Frank Sinatra, Sr. if he directed that money to be secured. I have a right to determine whether it was put up merely for the purposes of entrapment of these defendants and to bring about their arrest, whether it was lawful or unlawful entrapment, and I have a right to determine what his state of mind was with reference to the securing of that money. I can only secure it from him

personally. Neither Mr. Rudin nor anybody else can tell what Mr. Sinatra's state of mind was nor with reference to the transaction. I therefore respectfully submit that I have a right to have him here for that purpose.

"I regret that he is abroad, but if your Honor feels that we cannot go into this area, then we respectfully submit the matter. And I think -- may I have just a moment with counsel for the other defendants, because I am not speaking for them at this point? I am speaking for my client alone.

"I have one other area also, and I was going to see if I could get a stipulation from Mr. Sheridan this morning, and that was involving the voice on the telephone, as to whether at any time he ever heard any telephonic conversations between Mr. Sinatra, Sr. and my client, Joseph Amsler. I think this goes to Counts II, III and IV -- III, IV and V, particularly, your Honor, and I have a right to know if he at any time could recognize the voice or if there at any time was communication with him in interstate commerce in connection with this matter.

"Mrs. Root also wishes to be heard.

"THE COURT: She certainly may.

"MRS. ROOT: If your Honor pleases, I join with all of the statements made by Mr. Lavine and adopt them and ask you to consider them without myself repeating them.

"If your Honor pleases, your Honor has made statements in regard to the defense calling young Sinatra, Jr. back.

I wish to call your Honor's attention to your rulings made during the period of time that Mr. Sinatra, Jr. was on the stand which precluded any further inquiry, and I believe that this was covered by the offer of proof that Mr. Lavine made.

"I would like to call your attention to page 2949 of the February 28th transcript, Volume 13. This is on line 21, the question:

"'Q Well, did you tell your father -- what did say -- strike that.

"'Had your father ever given you any instructions at any time as to what might happen if you were ever kidnaped?

"'MR. SHERIDAN: Objection, your Honor. My recollection is that the identical question was asked about while this witness was on the stand.

"'THE COURT: It was, and I wondered why it wasn't developed. It will not be developed now. Objection will be sustained.'

And so on down. And I include page 2950 and your Honor's rulings therein, without taking the court's time to go into all the identical questions, and as to all of the objections made by counsel and the court sustaining them over to line 18 on page 2952.

"It is the contention of Mr. Irwin -- and I believe that I announced this at my opening statement, what we believed was the motive back of these alleged complaints

of kidnaping as based by the action of young Sinatra, Jr., and that this was purely for the matter of publicity.

"You will recall, I am sure, if your Honor pleases, that during the time of the cross examination I laid a foundation in regards to questions asked as to whether or not certain sales of stories had been made to Life Magazine and to another international magazine.

"Because of not having the information fully developed until my trip to Reno yesterday I was not in a position to further cross-examine in that regard.

"I will state to your Honor, though, I consider that we did not waive it under cross examination, we can present it in the case in chief.

"At this time it is our desire to have Mr. Sinatra, Sr. here for that purpose, and I therefore feel, although my co-counsel feels that they would like to have a conference before asking your Honor to rule, I personally feel that we are entitled to that ruling as of this time."

HERALD EXAMINER

C 2 Wednesday, January 22, 1964

George R. Hearst Jr., Publisher Hugh A. Lewis, Editor

Warning to the People: They Shall Not Know

Because in their expressed opinion the "dignity" and the "decorum" of the Federal Courts in the city of Los Angeles might be disturbed, the Federal judges of this area have clamped a lid on the freedom of the press.

The local Federal judges, in a ruling which is bound to reverberate across the nation, have issued an order which bars newspaper photographers and radio and television broadcasters not only from the Federal courtrooms here, but also:

The order prohibits the press photographers and radio and TV broadcasters from the entire second floor of the Los Angeles Federal Building, and from hearing rooms One and Two on the first floor of the United States Post Office and Federal Buildings.

This means that these photographers and recorders are not only denied their right to conduct their business of news and photograph gathering in courtrooms, but also in the "environs," which in this case means all corridors on the first and second floors which can lead to court or hearing rooms.

Now just how far does the power of the Federal judges extend in their autocratic denial of the news of the proceedings of the Federal courts? The Federal courts belong to the people. The courtrooms and the salaries of the Federal judges are paid by taxes from the people.

How far can Federal dictates go in deciding where and when the press—which is the media which transmits the news to the people of the proceedings of the people's court officials—must operate to obtain the news?

If the Federal judges can dictate that newspaper photographers cannot appear in or traverse Federal Building corridors, how much further can they proceed? Can they block off Main Street, on which the Federal Building is located?

The press does not in any manner attempt to persuade or sway any of the proceedings in Federal courtrooms. All it tries to do is record the facts as they are divulged and transmit them to the millions of people who read the newspapers or look at or listen to radio and television.

There must be some limit to the use of Federal restriction on the freedom of the press which is guaranteed in the United States Constitution.

SUMMARY OF TESTIMONY OF

JOHN NATHANIEL FOSS

DIRECT EXAMINATION

On December 8, 1963, John Nathaniel Foss had occasion to see Frank Sinatra, Jr. somewhere in the vicinity of 7 o'clock in the evening at his room at Harrah's South Lodge (R. 432) where he and a band had been engaged at Harrah's Club at Lake Tahoe, with which band Frank Sinatra, Jr. was the singer and the lowest on the marquee.

Dinner was brought to the room. (R. 433) During this period Frank Sinatra, Jr. attempted to make a phone call to Mr. Barzie, who was the manager of the band. During the two hour period he answered the phone once. (R. 433) Somewhere between i o'clock and 8:35 Mr. Sinatra was on the phone but not a full minute. (R. 434) There was a knock on the door and Frank Sinatra, Jr. said "Come in". The door was unlocked.

The man entering the room carried a cardboard case which appeared to be a wine case type. (R. 435) He took a few steps. Later the witness said he saw the figure of a man standing outside. Then he glanced back to the man who had entered the room at first and noticed he was holding a revolver, at which time he ordered Frank Sinatra, Jr. and himself to lie down on the floor on the other side of the bed, which they did without too much hesitation. (R. 436) The man then proceeded to tape Foss's

wrists behind his back and told him to keep his eyes shut. He first asked Frank Sinatra, Jr. where the money was before he began taping his hands and he said "The money is over there." While his eyes were being taped the second fellow suggested to the first fellow that he should hit Foss and the first man said "No, Joe. We don't want to hurt anyone", or something to that effect. (R. 437)

They got Frank Sinatra, Jr.'s clothes together. He wanted to put on some socks, but they apparently didn't want to take the time to look for them because they said "Forget about the socks", or something to that effect. The first man told Foss that if they got caught before they got to Sacramento it would be serious for Frank. These weren't his exact words. Also, he instructed Foss to wait ten minutes before he summoned any kind of help or any authorities. (R. 438) Then the three left the room and the door closed and he heard them walk off. In a matter of seconds he had worked his hands free and then he heard the door open again, the first man entered and came over and asked where the phone was and he heard sounds like the phone was being ripped. (R. 438) The man said "Give us five minutes before you call anyone", then he left the room. (R. 439) The lights in the room had been shut off except the bathroom light.

He began to take the tape off of his eyes, which didn't take long. He went to see if he could see anyone outside and he heard a car drive off. He saw no one.

He proceeded to the apartment of the manager and told her what had happened and had to repeat it several times. (R. 439) Then her husband appeared. It was around five minutes before he saw the manager. It was snowing. The temperature was around 32 degrees. (R. 441) No money was taken from him.

It was stipulated that the first man,who was identified, was the defendant Barry Keenan. The witness did not see the second man's face. (R. 433)

CROSS EXAMINATION

Keenan was wearing no disguise of any kind. (R. 450-451) He directed statements at Foss. Foss had come with a windbreaker and Sinatra left with it, a Navy blue one. (R. 454) Foss told Mrs. Moore when he saw her that Frank Sinatra, Jr. had been kidnaped. (R. 458) He told Mr. Moore, her husband, the same thing. (R. 458) When Foss saw Mr. Barzie (he was the manager of Sinatra, Jr. and manager of the band) he told Mr. Barzie someone had taken Frank and he was gone. (R. 461) Barzie asked him if he, Foss, was kidding, or something to this effect, and he repeated that Frank had been kidnaped. (R. 461) He did not know whether Mr. Barzie said anything. He and Mr. Barzie looked in the room to see if anything was missing. All they found missing was his jacket and Frank's clothes. They just stayed in the room very briefly and then he went back to the office to wait for the

authorities. (R. 463) The witness made no effort to go to the next room at any time, which was occupied by Mr. Barzie. (R. 474-475)

Foss and the Tommy Dorsey Band, with which Frank Sinatra, Jr. was appearing, had arrived about December 1st. At one time he had discussed with Frank Sinatra, Jr. that he thought it was regrettable that he himself hadn't been a bit more popular and had not been received a bit better. (R. 495) He believes he and Frank Sinatra, Jr. had discussed it. (R. 495)

SUMMARY OF TESTIMONY OF

FRANK SINATRA, JR.

DIRECT EXAMINATION

Frank Sinatra, Jr. testified that he is the son of Frank Sinatra, "the world known entertainer". (R. 518) He is 20 years old and his home is in Los Angeles. He said he had taken his education at the University of Southern California, at the Arizona State University and U.C.L.A. (R. 518) He is presently employed by the Tim Barr Amusement Corporation with their home offices in New York, that he is a professional entertainer and that he started his singing with the Tommy Dorsey Orchestra on May 2, 1963. They were in Phoenix from October 31 to November 11 to entertain at the Arizona State Fair. He was with them for 7 days. The engagement began two days before the assassination of President Kennedy and lasted until the first of December and then they went to the Ambassador Hotel in Los Angeles. (R. 521) Then he travelled to Stateline from San Francisco to Harrah's Club at Stateline, California, where they were working. He stayed at Harrah's South Lodge, which is across from Harrah's Club and he occupied room 417.

On the 8th of December, 1963, at approximately 7 o'clock that evening, he was in his room when he was first visited by Mr. Tino Barzie, the manager, between five and six o'clock and later his friend and fellow

musician, John Foss, a trumpet player with the orchestra, came and stayed until "we were interrupted". This was about 2-1/2 hours. The waiter brought up food. (R. 524) The room was on the second floor. There was a knock on the door and he said "Come in". A man opened it. He was approximately six feet tall, dressed in a ski parka with a hood covering his head and only his face was visible. He was carrying a wine box bearing the name Manischewitz. His reaction was that the man was between 20 and 26. (R. 526)

The man said "Are you Frank Sinatra, Jr.", to which he replied "Yes". The man said "I have a package for you", which he placed by the television set, on the carpet. He removed a leather glove from his right hand and produced a small caliber revolver. (R. 527) He pointed it at Mr. Foss and Sinatra. He said "Both you guys lie down on the floor and nobody will get hurt." For a moment Sinatra stared blankly at the weapon because he felt somehow perhaps this was some kind of a very bad joke. (R. 529) He and Mr. Foss both laid down on the floor. They were instructed to keep their eyes closed.

The man said "Where is the money?" (R. 529) and Sinatra said "What money?" He told him there was money in the passport case on the desk. (R. 530) It had $20 in it. After that he thought he heard the man going into the passport case. (The answer was stricken. R. 531)

A second man entered. The first man said "We have

to take one of these guys with us". He was first aware of the second man when he was ordered to lie down. (R. 532) He didn't ever see the second man. At the time he was only wearing shorts and a Tee shirt. They asked him where his clothes were and he was handed his shoes and a pair of trousers, and Mr. Foss's light nylon windbreaker jacket. The man reached in the closet and got Sinatra's heavy winter topcoat and told him to put it on. He did.

After he was completely dressed they proceeded across the parking lot to an automobile. One of the men was holding his arms. As he bumped into the car one of his hands, which was in front of his eyes, went forward and revealed an automobile, a two-door sport coupe. He got in the back seat. He was not tied at any time. He still had his hands over his eyes. (R. 537) After he got into the vehicle some man handed him two small plastic capsules and an army type canteen and said "Take these two pills". The man said they were sleeping pills. He took them and then he had a cloth sleeping mask. (R. 539) This was immediately after the car started. After the car pulled out of the parking lot he had no idea where he was going. (R. 541)

He denied having any knowledge of the two men coming into his room prior to the occurrence. (R. 541) He only saw the first man in the room (indicating Barry Keenan, R. 542), not appellant here.

After the car started there was a conversation between

the two men in the front seat. The first man said "They better not catch us before we get to Sacramento". The other man did not answer. (R. 544) It had begun snowing about 6:30 that evening. The temperature was in the neighborhood of about 20 degrees. (R. 545)

He was told to remove his blindfold and did so. (R. 545) He was alone in the back seat but there were various articles of clothing lying and hanging there.

He had on a gold signet ring which he first saw on his seventh birthday. It had his initials on it. He took it off shortly before they came to a stop and said, on his own, "I told the driver of the car that this ring was my signet ring bearing my initials and that if we were stopped by some kind of law enforcement agency that perhaps a policeman with good eyes might recognize the initials." R. 548)

The first man said "We are coming to a roadblock. You lie on the back seat there and pretend that you are asleep and play it cool and nobody will get hurt." (R. 548) He didn't recall if anything else was said. It was at that time that he took off his ring. Before coming to the first stop he was told that if he was questioned he was to use the name of John Wade. (R. 549) He replied that perhaps the best way to pass this roadblock was that if any policeman stopped the car that they were in they could tell the policeman that they were friends, that they had been to a party, that he had had

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too much to drink, that he had collapsed on the back seat and they were driving him home. The car pulled up to a stop. (R. 550) Both men immediately climbed out of the automobile. He had no blindfold on. He could hear them get out of the vehicle. He could not see the man from the passenger side moving without turning his head and making it obvious to both men that he could see.

He could only see the man from the driver's side of the car, who proceeded back along the left side of the car to the trunk area. When the automobile stopped both men immediately climbed out. One of the men at this time apparently went around. The first man said "Here come the cops". He did nothing. He lay right where he was. (R. 551)

He heard a motor drawing near from the opposite direction. Looking out he saw the black top of a four door sedan which was illuminated brilliantly by the revolving red beacon. (R. 553) He heard the policeman get out and ask the first man, who was around by the open trunk of the car, what he was doing. He replied "We only stopped to remove the chains from our car". The policeman asked if they noticed any other cars pulled over to the side of the road. The man answered "No." The policeman returned to his car and drove away. The policeman did not stick a flashlight into the car. (R. 555) At no time while at that location did he talk to the policeman.

He was told that they were stopped at a roadblock.

It was about 2/10ths to a quarter of a mile from where they were first stopped to when they got to the roadblock. When they got there the passenger right window was open and a man's voice said "You had better stop or I will blow you right out of there". The vehicle had stopped. (R. 558) He did not know whether the men in the vehicle had discarded the gun. (R. 559) He did not know whether an alarm had been given in relation to him. He had had experience with roadblocks before. (R. 561) At no time that the car was stopped at the roadblocks did he make any attempt to escape. The thought had entered his mind and he had decided against it. (R. 562)

"Q. At the time you were taken from your room, did you in any way consent to leaving your room with those men? A. I offered them no restraint."

"Q. At the time you were at the room, when the men were there taking you out of the room, did you at any time say anything to them in substance or effect that you were willing to go with them? A. No, I did not."

"Q. Did you voluntarily go with them, with the men? A. I only followed the directions they had given me. (R. 563) ... My state of mind at the time that I was taken out of my room was the fact that immediately prior to the events which are relevant to this lawsuit, I was helping my friend, John Foss, who had a very serious emotional crisis. His emotional crisis, which is completely irrelevant to this case. It is just a personal thing that he

was having problems. He was not in a good mental state to begin with when this whole business took place, and so I decided to cooperate with these men only because his life as well as my own was in jeopardy if I refused the demands that they made. ... And so as I answered your question, sir, I merely followed their directions and proceeded with them. I gave them no verbal consent about leaving the room, but I did cooperate with their demands and made no restraint against going with them."

Sinatra was allowed to testify on direct examination as to his state of mind at the time the car pulled up to the roadblock. Then he testified that they drove approximately 1-1/2 hours. He was told the second man was in the trunk. They felt that if any alarm about his being missing had gone out, the police would look for three men in a car. The first man believed that by putting his companion in the trunk he would not be caught because there would only be two in the car. (R. 567)

The car stopped and another man joined them. They woke up a general store type proprietor to buy gasoline. (R. 568) Sinatra was not blindfolded and not tied up. He did not try to get away. He surmised the other man was still in the trunk. A couple of times both men got out of the car, a couple of times only one.

There was not more than one roadblock to his knowledge. He slept during the night, but couldn't say how long. (R. 579) The first man said if everything looked

good they would release him when they reached Sacramento. Later he said Sacramento would be too risky, they would leave him at Oakland Airport. He said if they released him there he could take a plane to get back to work on time for the fourth show. (R. 571)

There was only one stop for gasoline. He was not blindfolded on the trip but the blindfold was placed on him during daylight. (R. 572) When he got out of the car he was guided up a small step into a building. He sat in a padded arm chair.

There was conversation and for the first time Sinatra said "What is this?" The first man said "You are involved in a major kidnaping" and Sinatra said "Kidnaping for what purpose? towhich he replied "For the purpose of money". Then Sinatra asked "Money from whom?" and he said "Money from your father". (R. 574) During the time he was there he slept and he asked several questions: how long he was to be held captive (R. 576) and they said something to the effect "Until we get the money".

He said he could identify the car, a 1963 Chevrolet Impala SS two-door sports coupe, white with blue interior. (R. 577) The radio was on most of the time. The conversation was that these men were simply executing a plan for the higher ups. (R. 579)

He declined to give his mother's phone number. He talked to his father three times on December 10. (R. 584) He was informed his father was in Reno, Nevada. The

receiver was given to him. He was told Joe and Barry had gone out after the money and the third man said he had bad news for him because Joe had disappeared. (R. 591) He said they couldn't release him until Joe was found. He was fed hamburger and some cole slaw and baked beans and Seven-Up to drink. (R. 591) He had some brandy on Monday night. Later he asked for some more and he was given more brandy. He didn't recall whether any of the three men drank anything alcoholic.

"The No. 3 man made it quite clear to me that so far as he was concerned, he would like very much to dismiss me, but that No. 1 man told him to hold onto me. But then he did finally decide to dismiss me and he expressed some doubt about really thinking it was the right thing to do inasmuch as the fact that he was using his own car to take me away in. So then finally I guess he decided regardless of what, he wanted to dismiss me, release me. So I was placed along the back seat of the car. He started the car and drove away. (R. 593) He said, 'Where' -- we had talked earlier about a place. He said he was not familiar with the Los Angeles area, that he wanted a place to release me where there were not too many people around ... so I recommended to him the area of Mulholland Drive off the San Diego Freeway, which spans the length north and south between West Los Angeles and Van Nuys", where he was familiar with the area. He was lying down on the back seat and told the man where to

leave him off. He told the man how to get there. After he got there he was let out of the car. It was dark. He picked the spot on Mulholland Drive off-ramp at the crest of the exact top of the Sepulveda pass.

The man thought it was awfully dark there and asked if he would be all right. Sinatra said "Isn't this what you wanted? Because in fact there were no people around and there was no lights, no buildings, no nothing." He was let out of the vehicle which sped off. He removed the blindfold. (R. 599) He walked across Mulholland Drive to Roscomare Road, and turned into Bel Air where his mother lives. It was 2:55 a.m. He yelled at the driver of a Bel Air patrol car and they got together. (R. 602) The driver took him first to the Bel Air Patrol Station, at the entrance to Bel Air Gate No. 1, off Sunset Boulevard, and then, at his own suggestion, he got into the trunk of the vehicle. (R. 604)

When he got to the house at 2:55 a.m. (R. 607), the first person that he spoke to when he got out of the trunk was his father. He said "I'm sorry, Dad".

Mr. Sinatra said he had not seen Mr. Foss from the time he left on December 8 until he saw him outside of the court. He said he was not mistreated nor were any threats of any kind made by anybody. (R. 626) The only threat that was made was that he told them that if he was not released by a certain period that he was going to kill both of them and that was the only way they could stop

him from killing them would be by killing him. (R. 626) He said the two men assured him they were larger than he was and that he would be easily subdued. He was interviewed by the FBI almost immediately after he returned home. (R. 629)

He said there were times when he was frightened and there were other times when he was angry during the period. (R. 633) He stated that from December 8 until he was released, none of it was a publicity stunt or a hoax. He denied that he had any involvement in making arrangements in advance for any of that activity. (R. 634)

CROSS-EXAMINATION

Sinatra testified he only saw the gun once, in the room. (R. 635) He could not tell whether it was loaded or not. He was never tied or gagged. He said the No. 2 man had his right arm only for the purpose of leading him down the balcony because he had his eyes shut. (R. 647)

Mr. Foss had been drinking beer prior to the knock on the door. He had stated that Mr. Foss was pretty well loaded. (R. 649) He was trying to sober Foss up, that was why he ordered dinner. He ordered four beers with the meal. (R. 650)

Just after the car started Inatra said "You won't believe me but I hope you guys get away with this. I know what it's like to be afraid. You have really got guts." Asked if he said "Things like this are always

happening to me. John probably thinks it is a joke. He is used to this type thing," he admitted he believed he would make a statement like that.

His testimony as to the ring and the events at the roadblock was substantially the same as in his direct testimony. Asked if after the policeman had left in his car he (Sinatra) had said "That s.o.b. Who in the hell does he think he is?" (R. 670), he replied "That is correct. I made that statement".

"Q. Then you said 'Kooks like that bug me. If I ever have the power, I'll see that he's taken care of. A. It is something to that effect, but when I said that, I did not indicate this particular policement".

He admitted he said "You guys don't have to worry about me. I'll keep -- I'll help you. Don't worry about roadblocks.

He did not know whether the police every looked into the trunk of the car on any of the occasions. (R. 672) The car stopped on say five or six occasions. He testified again as to stopping for gasoline. In a general running conversation, Sinatra made the statement "things haven't been too hot for me lately. I have been only netting approximately $100 per week." (R. 684)

He said he had been approached by Life Magazine for the purpose of issuing his personal feeling about being in such a position. He refused their request. (R. 695) He was approached by several other magazines,

he didn't recall who. He said they had not approached him personally but the Sinatra Enterprises office, which is a corporation of all his father's businesses. (R. 697) He learned about it from the telephone operator and his father's secretary, who had both received various calls from different publications, both legitimate and smear sheets. He didn't know whether they had offered money or not, but they had offered interest in his story. He realized it was only a question of time before it would appear in print. He denied that it was discussed on an occasion prior to December 10 that it would be beneficial to his career if an event such as a kidnaping would occur. (R. 699)

He denied he was making a grand appearance for television and radio. There were probably at least 50 newspapermen there when he appeared. (R. 703) He didn't know how many television people there were. All the major networks.

He denied knowing Dean Torrence. (R. 705) He said he had been in the ROTC Training Corps. (R. 709) He made no effort at any time while he was sitting in the back of the car to reach over and grab the man in front of him or the keys. At no time did he attempt to identify himself to the police, nor did he attempt to get out of the car at any time.

"Q. You were consenting to go along without any disturbance, weren't you? A. That's correct."

"Q. Again you were consenting to go along, were you not? A. That's right." (R. 727)

He said he had heard by the proverbial grapevine there was a rumor that he had received an offer of $65,000 for an account of this case. (R. 729-730) He admitted that since the occurrence he has appeared on the Ed Sullivan Show in London and various other cities.

When he saw his father it was about 2:55 a.m., December 11. When he met his father he said "Dad, I'm sorry." At no time did he ask his father to put up any amount of money in his behalf.

He did not give Mr. Irwin the number of Vicky London. He denied hearing the No. 3 man talking to Miss London.

REDIRECT EXAMINATION

He testified he had asked one of the men to call Lake Tahoe and tell the band manager that he would be back to complete the rest of the show that evening. (R. 941) There had been conversations to that effect.

He said he thought it was some time after the road-block incident, probably in the mid-hours of the morning of Tuesday that he turned the ring over.

He again denied that it was any kind of a hoax or any kind of a publicity stunt. (R. 946)

RECROSS-EXAMINATION

He admitted that he was under no moral compulsion to

tell the truth while he was with the men and he was telling them fictitious stories. (R. 947) That he was telling them untruths. He was doing so only for the purpose of preserving his life and well-being. (R. 949) Asked what untruths he told them, he said "I told them at no time did I feel any personal animosity toward the accused, which in itself is an untruth. I very definitely felt a personal animosity toward them... I shook hands with these men because they could very easily have hurt me and they didn't and for that I was grateful". (R. 953)

He stated he was confused about the ring. (R. 958) "It seems as though I was wrong in saying that -- I took the ring off before the roadblock as such. Perhaps it was merely confusion on my part because of the fact that every time during the remainder of that trip that night which lasted from 9:30 until it was daylight every time that No. 1 man saw blinking lights ahead he said 'I wonder if this is another roadblock. Are we coming to another roadblock/' That was his first idea. Perhaps this thought is that had stuck in my mind." (R. 958)

SUMMARY OF TESTIMONY OF

FRANK SINATRA, SR.

DIRECT EXAMINATION

He stated he resided at Palm Springs and that he was an entertainer. (R. 1317)

On December 8, 1963 he received a call and left Palm Springs at approximately 11 p.m. and went to Reno to the Mapes Hotel. He authorized the FBI to open his mail and listen to a telephone call. There was a combination of one single phone with two phones tied together. He received a phone call relating to his son. He had heard the voice before earlier on Monday monday, December 9; then he got another call just past noon.

He left the Mapes Hotel and went to a gasoline station in Carson City (R. 1321) and then at a second service station he had another telephone call. He was accompanied by Dean Elson, an FBI agent. (R. 1321)

He flew down to Los Angeles and went to Mrs. Sinatra's home in Bel Air (R. 1322), arriving shortly after 9 o'clock. He went to a service station on Santa Monica Boulevard and Camden, then returned to the Nimes Road address of Mrs. Sinatra. (R. 1323)

The voices on the telephone, the one on Monday at 4:45, the one on Tuesday at 9:05, the two in the gas station in Carson City and the one at the Nimes address and the one in the gas station in Los Angeles and the one

later at the Nimes address were all the same. The gist of the calls was "I have got your boy". He remembered asking what he wanted and he said "I'll let you know later". The first call was brief. (R. 1330) At the time he gave his consent to intercepting the telephone calls his attorney, Milton Rudin, was present.

Around 9 o'clock he received another call. He spoke to the same person and then to his boy. He spoke to the voice and asked him what he wanted and he said "Money". (R. 1331)

He went to Carson City, driven by Elson. (R. 1334) When he got there he used the pay phone and wrote several lines. The voice on the phone said he wanted $240,000 in the following denominations: (Exhibit 48) 700 - $100 bills; 700 - $50 bills; 4000 - $20 bills; 4000 - $10 bills; 3000 - $5 bills. He was told that it must be used money and no more than eight in a series in a package 22 inches high. (R. 1339)

He received instructions where to go. He was told that the courier should have a driver's license, note paper and a pencil, a dollar in dimes, a dollar in quarters and $200 in cash, should be well acquainted or familiar with the Los Angeles downtown streets. (R. 1343) He was asked for Mrs. Sinatra's number and gave it. He was told he would receive further communications.

He flew from Reno to Los Angeles and landed at Burbank. The FBI was with him. (R. 1345) Before he left

the Mapes Hotel he gave instructions to Mr. Rudin about the sum of $240,000. (R. 1346) He was told that a courier should deliver the package of money or rather should go to the Western Air Lines counter. (R. 1349) He was to turn around facing away from the counter to a bank of telephones and walk to the one on the far right where he would get a call. When the phone rang someone would say "This is John Adams" and he was to answer "Patrick Henry". (R. 1351)

On this particular occasion he talked to his son. He was satisfied that it was his son's voice. He was given guarantees that when the money was delivered that three or four later they would deliver his boy or he would be notified where he would be. (R. 1352)

Asked if he personally made arrangements for the $240,000, he said "Oh, I guess you might say I did. I instigated the arrangements. Then Mr. Rudin followed it."

"Q. And you didn't personally count out the money, did you? A. No."

"Q. Did you ever see the money, sir? A. No, I didn't."

"Q. Did you see any sort of container for the money? A. I did." (R. 1352)

He identified a bag that was delivered to Nimes Road to in turn be delivered by a courier, a federal agent.

The call that came on Tuesday said something had gone wrong, nobody had shown up. He was told his boy had

been dropped somewhere in the area of Mulholland Drive and the San Diego Freeway and was advised to get him because it was cold. The voice said he wished to hell he had never gotten into it but it was too late to get out and he was sorry.

He went over to Mulholland and the San Diego Freeway. (R. 1355) He did not find his son and returned to the Nimes Road address, where he first saw his son in an automobile driven by a guard. He was getting out of the trunk of the automobile. After spending a few minutes together, the boy was interviewed by the FBI.

He denied the episode was a hoax. He denied he had arranged to have his son taken from Stateline, California and brought down to Los Angeles or had in any way arranged for his son to have publicity for the picture "Four For Texas". He denied that his son ever told him it was a hoax or publicity stunt.

CROSS-EXAMINATION

He said the first thing his son said was "I'm sorry, Dad." (R. 1361) He told of his conversation on the phone with his son and be believed somebody asked him to put up some money.

There were a large number of newspaper, radio and television people at Mrs. Sinatra's home. He made a statement to the press; he didn't hear his son make any. (R. 1367) He denied he had given him instructions on his

first appearance to the public that he must have a good press and good publicity. (R. 1373) He acknowledged an article in Life Magazine of August 23, 1963 in relation to advice he had given to his son regarding the handling of the press but denied he ever gave him any advice at any time on how to handle publicity. (R. 1374)

SUMMARY OF TESTIMONY OF

DEAN TORRENCE

DIRECT EXAMINATION

He testified he is a singer and that he lives with his mother. (R. 1837) He, Barry Keenan and Joseph Amsler had gone to school together. (R. 1841) He had never met Frank Sinatra, Jr. or Frank Sinatra, Sr.

He had a stock trading relationship with Barry Keenan and they had a safety deposit box together in the United California Bank, 10210 Santa Monica Blvd. He had given money to Keenan from time to time and Keenan owed him $1200 (R. 1848) over a period of four or five months. The borrowing first started during the summer of 1963. The largest amount he loaned Keenan was $500. (R. 1850) He testified that he had no knowledge of any kind, prior to December 8, 1963, about the kidnaping of Frank Sinatra, Jr.

CROSS-EXAMINATION

He denied Mr. Keenan handed him $25,000 in a paper sack while he was washing his car on December 11, 1963. (R. 1869) He denied that Mr. Keenan came back on Friday and said that "Capture is imminent, you had better give me back the money" and that he returned it to him at that time. (R. 1870)

He said that Keenan was his best friend and had been

for about six years prior to that time and he had given him approximately $1200. (R. 1871)

He said he first heard about the kidnaping on the radio. He said Keenan didn't tell him about going to Tiajuana for guns and about being arrested for possession of firearms. (R. 1873)

After the noon recess the government put him back on the stand and he admitted that he made up some stories, that he did know about the so-called kidnaping, that he did get some money and gave it back.

He said he first heard of the kidnaping of Frank Sinatra, Jr. "probably in about October, I guess" (R. 1976) He heard it "From Barry Keenan". No one else was present. "He just said he was going to be involved in a crime, a major crime, and that he would like to tell me about it. ... He told me about how he was going to abduct him, and things of that sort." (R. 1977)

"Q. Did he tell you anybody else was in on it with him? A. No, sir."

"Q. Did he ask you to go in on it with him? A. No, sir."

"Q. He just discussed it with you? A. Yes." (R. 1978)

He said he would be glad to loan Keenan money and keep him living if he didn't go through with it, but Keenan said he would rather be dead if he didn't have

the money. (R. 1980)

"Q. On this occasion on December 11 when Mr. Keenan came to your home, did he have any money? A. Yes, sir"

When he brought the money in he said "It is in your shower" and then he left. He left the paper bag with the money in it. Torrence didn't count it. Friday Keenan said "Met me and you can give it back" and he met him and Dennis Gray in Culver City and gave him the money back.

Torrence said he did not participate in the kidnaping of Frank Sinatra, Jr. in any way. He said he was told to tell the truth but he did not tell the truth when he first took the stand and he had a change of heart, a change of mind, after he left the stand and wanted to correct his testimony and he decided he'd better confess up. (R. 1984)

On cross-examination he said no one on the defense side had lied to him. He said that he did not count the money and he admitted returning the money to Keenen on December 13. (R. 1897) He denied receiving the money for financing the kidnaping. (R. 1989)

He said Keenen had told him about the kidnaping but "I thought it was a story." (R. 1990) He said Keenan had a booklet and it had the phone numbers that were to be called and how the whole plan would be worked out basically. (R. 1992-1993) He only saw a couple of handwritten pages and didn't know how many pages it had. He didn't really think they would do anything like this. He said

Keenan had said he had a fairly good 50-50 chance, which he (Torrence) didn't think was worth it at all. (R. 2000)

SUMMARY OF TESTIMONY OF

RONALD BRAY

DIRECT EXAMINATION

Bray said Keenan had a conversation with him, possibly around the early part of October, 1963, as to whether he would like to make $10,000. Keenan said "It's illegal. It requires picking up some money". Bray asked if it was kidnaping and Keenan said "Yes." Bray refused. Keenan did not tell him who the man was but said his parents had access to large amounts of money and if Bray knew who it was he would realize how fool-proof the scheme was. Later he said he might as well tell Bray that it was Frank Sinatra, Jr. (R. 2018)

Keenan asked him if he wanted to be in on "the operation", but Bray said that he did not wish to be. (R. 2019) He had further conversations on three other occasions, at one of which he mentioned the names of John and Joe and once gave him the name of Amsler. (R. 2020)

He went with Keenan to Mexico. On the way there they stopped at a gunshop, but Keenan did not buy a gun. They were in Keenan's car. Bray said he did not want to have anything to do with it. (R. 2021) Keenan said he could walk across the border and they separated. He went to a bar, and Keenan was gone a matter of hours. He rejoined him and they went home.

Keenan told him he had found the guns that he wanted

but said he had paid the man and as he was examining them a Mexican policeman came in and confiscated the guns. Barry said that on the way to the police station he had talked his way out of it. They let him go, but he lost his money. (R. 2024)

Keenan told him there were others involved in the matter, one a successful businessman and said that it was a well planned operation. To his knowledge, Barry Keenan was not a successful businessman. (R. 2025)

On the trip back from Mexico Keenan stopped to make phone calls and said he couldn't get Amsler. (R. 2025)

Keenan stayed at Bray's home in October. At that time he took some guns out of his car and showed them to Bray. There were two guns. (R. 2026) During October and November Keenan was living at different places and was using other names. He stayed at the Farmer's Daughter Motel and used the name Robert Allen. (R. 2028-2029)

On November 17, 1963 Keenan came to Bray's house with a rented trailer attached to his automobile and spent the nightat Bray's house. (R. 2037) Keenan purchased furniture (R. 2038) and they took it out to a little white house in Canoga Park at 8143 Mason Avenue and unloaded it. Keenan made some phone calls and they returned the trailer.

He asked Bray at one time if he had told him who the backer was and Bray said he didn't want to know. It was right after this he was asked if he would pick up

the money. (R. 2043) He told Bray that he would pick it up at the airport from a man, get in a cab and make several changes. There was some conversation about clothes.

When Bray called Keenan at the Farmer's Daughter Motel he (Bray) gave fictitious names, Alain Gerbult and Bill Donais. (R. 2046)

On December 7, 1963 Keenan called him from Lake Tahoe about 7 in the morning and woke him up. He asked him to call a person named John and ask John to call Keenan at a certain number. (R. 2050) He called the number and talked there to a woman on Monday, December 9. The word "kidnap" was not used in the conversation when the call came. He was not aware that Frank Sinatra, Jr. had been taken from the hotel room. (R. 2054)

Keenan did not ever tell him that the proposed plan of kidnaping Frank Sinatra, Jr. was a publicity stunt or a hoax; he did use the word "illegal". (R. 2060)

CROSS-EXAMINATION

"Q. Then when you went out and made these two trials runs, you knew that this was in cooperation with this so-called operation, didn't you? A. I suspected it. I imagine I basically deep down knew, but I really didn't think I was doing anything that was drastically wrong. I wasn't having anything to do with the actual crime". (R. 2130)

Keenan told him it was a foolproof plan and he

didn't think he would be caught. He did not recall his saying that Frank Sinatra, Jr. would cooperate.

When Keenan returned from Phoenix he had some guns. He knew also that before he went to Tiajuana he had a fairly large sum of money. (R. 2115)

He told Bray different things about it, but Bray said "No." There were two trial runs in connection with the matter in which Bray participated. (R. 2139)

SUMMARY OF TESTIMONY OF

JOSEPH CLYDE AMSLER

DIRECT EXAMINATION

Defendant Keenan did not take the witness stand but defendant Joseph Clyde Amsler took the stand and testified to his early days in high school and having met Dean Torrence, having been a member of the Barons and having been acquainted with Nancy Sinatra through the Tierres. (R. 2991) He was honorably discharged on September 21, 1962 after three years and eight months in the Navy. (R. 2992)

He worked as a diver in Catalina for a man named Al Hanson, who had a son named John Hanson. (R. 2993) They were employed at Santa Barbara, California, with Veteran Fisheries, an abalone fleet. His employment terminated somewhere around the middle of November, 1963, because of a horrible run of bad luck.

He saw Barry Keenan first after July 4th. Amsler was married October 21, 1963. He told Keenen he was looking for a job and Keenan said he thought he had a job for him and asked him to take a walk around the block with him. He said he had a perfect plan, he had researched it and other things and had everything worked out. He wanted to know if Amsler would be interested in his plan. He said it was kidnaping. Amsler told him he was crazy. "I said I think you are ridiculous even thinking about

it and I tried to dissuade him from talking about it." (R. 2999) He didn't mention the victim's name. Amsler said he thought it was just a dream.

They hadn't seen each other since high school days. He saw Keenan again around October, about a month later, at the Barefoot Bar at the Cliff House on the Coast Highway on the Pacific Palisades, accidentally. He had come down from Santa Barbara and was there with John Hanson and Johnny Long. He was surpised that Keenan was still thinking about his plan. They talked about Keenan's 1963 Impala Chevrolet. At that time Keenan had a manila folder filled with typewritten notes, about 30 or 40 pages, bound together. He said it was the script for the operation. He said he couldn't tell Amsler too much about it but that it was foolproof and there was no chance of getting into any trouble. Amsler didn't believe him and told him he thought it was crazy for him to be thinking about this thing. He said he was actually going through the details of it. A little later in the conversation he thinks Keenan mentioned the name of the victim.

He told Keenan he wasn't interested in his foolproof operation. Keenan said there was a chance to make a lot of money and Amsler said "No." He told Amsler the person who was to be the victim of that operation was to know about it beforehand, that was why it was perfect.

"Q. Did he give you the name of the person that

was involved? A. Yes, sir. He said it was Frank Sinatra, Jr. and I asked him if it had anything to do with Nancy and he said "No", it had nothing to do with Nancy, because that's the only person I knew. I thought -- I didn't know Frank Sinatra, Jr. personally but I thought Barry did and he said he wished I would be in on it because it would be for my good and I told him it sounded like a crazy scheme and I still wasn't going to be in on it."

He didn't tell Amsler what to do in connection with the operation at that time. He just wanted him to be with him. Amsler said "No". (R. 3006) That terminated the conversation. It was like someone coming up with a crazy scheme, a pipedream or something. Amsler thought someone had been pulling his leg.

This was about the middle of November. The conversation out at Castellamare was about the middle of October.

He next saw Keenan around the fifteenth of November. He had just quit diving in Santa Barbara. He told John Hanson and Johnny Long what he had heard from Keenan. (R. 3008)

When he saw Keenan again he said there was still a part in it for him if he wanted to be in it. (R. 3010) He said all Amsler had to do was follow a courier and see that the car was not followed. He offered Amsler $2,000 for doing this. (R. 3010) He said the whole thing,

had been worked out, he had a script for it. He wouldn't go into the details.

Amsler still had doubts about being in it with him. He told Amsler he could get $15,000 if he picked up the money. (R. 3011) It was a different part altogether in addition to the $2,000. (R. 3012) He told Amsler to have confidence in him, that they couldn't get in trouble. He said he could tell his wife he was working for him installing transparent blinds. Amsler didn't have money to pay for breakfast and Keenan gave him $20 and told him to tell his wife that it was for part-time employment, that he had worked for Keenan that day. (R. 3012) He saw Keenan maybe every other day and Keenan would give him, on these occasions, $10 or $20. Keenan would say that everything looked great, that Frank was playing at the Ambassador here in Los Angeles and that the whole thing had been set up to get him while he was here in Los Angeles.

Amsler's part in this operation was to pick up the money. (R. 3013-3014) He was assigned a specific duty but it was the date that President Kennedy was assassinated and the matter was called off. (R. 3015) Amsler thought the whole thing still was a joke. (R. 3017)

On December 3 or 4 Keenan asked him if he would like to go with him skiing at Lake Tahoe (R. 3019) and he thought it was a good idea. He said he always was able to get a job out of town. Instead of going to Tahoe, they

went to a house on Mason Street and stayed overnight. Keenan said he didn't like it and was going to give it up. (R. 3020) The next morning they left for Tahoe. (R. 2021) He didn't think he had over $2. (R. 3022)

They went from Bishop to Lake Tahoe. Barry asked him if he wanted to go hunting. In a fleeting sense, Keenan mentioned Frank Sinatra, but nothing was said as to his whereabouts nor where he was going. When he got up to Lake Tahoe he saw the sign on a marquee that had Frank Sinatra's name on it and he said "What a coincidence. Barry, has this got something to do with the scheme you -- we were supposed to pull off" and Keenan said "Oh, maybe". Amsler said he was sick of hearing about it and didn't want to hear anything more. Keenan said to consider the subject closed and stop talking about it. (R. 3026) He did not know that Frank Sinatra, Jr. was at Lake Tahoe prior to their arriving there. (R. 3027) The first he knew that he was there was when Keenan called his attention to the marquee.

Keenan signed the register at the hotel, and when Amsler got to Room 319 the door was locked. When he knocked on the door and Keenan opened it he said "Oh, good afternoon, Mr. Gardiner." Amsler said "Mr. Gardiner?" Keenan stuck out his hand and said "I'm Mr. Allen". Amsler said "What's this. What's this bit?" and Keenan said it was just a part of the plan. (R. 3029)

Amsler asked how they were going to pay for the room.

"And he said, 'Well, if we need money get in touch with the backer."

"Q. Backer? A. Yes, sir. And I said, 'Well, what do you mean by that?' And he said, 'The financier of this operation.' And I asked him who it was, and he said, he commented, 'Well, you know, Dean.'"

"Q. And what did you say? A. Well, this really shocked me. I said, 'Do you mean Dean Torrence? And he said, 'Yes.' And I asked him, I said, 'How many people are in on this thing' with him, and he told me that Dean and John were in with him and that he had told --"

"Q. Wait, now. Dean is Dean Torrence? A. Yes, sir."

"Q. All right. What did he say? A. Well, I remember him saying he had told Johnny Weismuller and Dennis Gray and Bonnie Bray, and he said some other people that I didn't know. And I commented to him that I had told a few people too. And he asked me who they were, and I said John Hanson and Johnny Long. And I asked him, I said, 'Do you think it is a good idea, everybody knowing about it?' And then he says it didn't make any difference. He said everything was all worked out, everything was planned." (R. 3030-3031)

Amsler still thought it sounded like a crazy scheme and that they would get in trouble and said he didn't feel like being a party to it. The subject was dropped. He took a shower.

He put his last fifty cents in a slot machine and it

paid $5. They built that up to around $25. (R. 3032)

They discussed the operation again and Keenen said it was ridiculous not to go through with it and that if Amsler knew anything about it, he would be all with him, but he said he couldn't tell him. Amsler said they were broke and charging food to the hotel and it just didn't seem right to him and he wanted to go home. "Actually," Amsler said, "I decided to give up the whole thing and I'd just as soon return to Los Angeles and I told Keenan that." (R. 3034)

Amsler said "Well, that morning he said -- Sunday morning he had planned to pick up Frank Sinatra after his last show on -- it was actually Sunday morning. He was supposed to finish at around 4:00 or 5:00 in the morning. And we had been gambling that night. And he had cashed some checks up there also, by the way. And he decided everything wasn't right again. And I just flat told him Saturday morning that I wasn't in on it, and that I wanted to go home and that we were going to leave today." (R. 3034)

When he got up on Sunday, December 8, Barry was gone. When Keenan came back he said they'd make one more effort and if it didn't come off, they would leave. He said Keenan promised. (R. 3036) "He said that he was going to go over there. He said he knew where he was staying and he wasgoing over to the room and we were going to pick him up and go down to Los Angeles. He said it would be that

evening early."

He had no money, not even a penny. He might have had some loose change, but he didn't have a dollar.

Keenan told him they were going to pick Sinatra up. (R. 3036) He didn't believe that they were going to pick him up when they left for his room. His intent was to leave. He figured this was just going to be another dead end, "a Barry's scheme, whatever it was, and that we would leave". He was, in a sense, calling Keenan's bluff.

Around 3:30 Sunday they went to Sinatra's room. Amsler didn't want to take the gun. Keenan said "You can take the gun, it doesn't have to be loaded." (R. 3040) The cartridges had been removed. He took the gun but it was not loaded. Keenan said they had to make the thing look right and he agreed to take the gun if it wasn't loaded.

He said he wanted to leave that night and Keenan had prepared the car for the trip that night. He put chains on. (R. 3041) It was snowing.

When they walked up the stairs Keenan stopped in front of Sinatra's door and started to knock. Amsler said "You are not really going to do this, are you?" and he said "Yes" and knocked on the door. A voice said to come in. Keenan opened the door.

"Q. What did you do or say? A. I said, 'No,' again. I said, 'No. No, Barry.' "

Keenan had started to enter the room when he said this.

Keenan said "Come on", and waved him through the door. (R. 3042) "There were two people in the room who were already getting on the floor. I don't even think they saw me." (R. 3043) Amsler was dumbfounded.

Keenan asked one of them where the money was. Told it was on the dresser, he told Amsler to get it. He went over and got $20 out of a wallet that was there. The gun was in his pocket. He did not take the gun out.

"Q. What happened next? A. Barry said something like, 'We're going to take one of these people with us'. And he motioned to Frank some way. He might have said something, 'Frank,' or whatever he said, anyway, 'put on your clothes.' And then he started getting Frank's clothes out for him and Frank started dressing."

He said they were in the room approximately five minutes. Then they left with Sinatra. Sinatra was supposed to cover his eyes with his hands. Amsler took him by the arm to lead him so he wouldn't stumble. He took his right arm and Keenan went ahead of him and they walked down to the car. He corrected his statement to say he was holding his (Sinatra's) left arm with his own right arm. They went to the end of a long balcony. Sinatra had his hand over his eyes. Sinatra, Jr. at no time objected to leaving. (R. 3045) At no time did he say he didn't want to go or anything to that effect. He didn't say very much at all. "He seemed very clam, so I got the idea that -- I guess the thing was all ready, you know --"

He opened the car door for Sinatra and told him to get in it and lay on the seat. He got in on the seat. (R. 3046) Keenan was driving. They turned right out of the driveway onto what he now understands was Highway 50, the main road up around Lake Tahoe. (R. 3047) He told Sinatra to put on a blindfold that Keenan handed him. Neither Sinatra's hands nor legs were taped or bound at any time. (R. 3051) Keenan said to give Sinatra his pills, so he did. The pills, little capsules, came from the glove compartment. He gave him an army canteen when he asked for water and took the pills.

There was nothing out of the ordinary in the conversation. (R. 3053) Keenan figured Foss would report it right away, and they were expecting roadblocks. Sinatra, Jr. suggested they pretend he had had too much to drink and had passed out on the back seat and they were taking him home. They agreed.

A little while later they came around a corner and there were red lights all over the place. He was panic stricken. (R. 3054) He jumped out and ran down the side of the mountain and into a barbed wire fence and fell down in the snow and laid right there. (R. 3054) When he came back Sinatra was still in the back seat with his legs across the seat. He did not see the police cars when he saw down the side of the hill.

When he came back in about five to ten minutes, Keenan said the police had left. He waited for a couple

The trunk was open. Keenan said the police just came and checked them out. Keenan told him he was going to get back in the car, was going to turn off the lights in a second, and that when he turned out the lights to run and jump in the trunk. He cleared a space for Amsler. That was the first time he got in the trunk of the vehicle. (R. 3057) He realized they were going by the roadblock. He took the gun out of his pocket and put it in the cowboy boot that was in the trunk.

The police stopped them and he heard a voice say "You had better stop or I'll blow you right out of that car". It was a very rough voice. Barry told him they had talked to the police up the road and thought he had been motioned on. Keenan apologized and then they started up again. (R. 3058) He didn't hear the conversation between Keenan and Sinatra, Jr.

He remained in the trunk about 15 minutes and then he got back in the front seat. Sinatra was still in the back seat. (R. 3058) Keenan talked about the cop scaring him. Frank Sinatra, Jr. said "Yes, cops like that really bug me." He said "I wish I could get even with them", or something like that. (R. 3060)

Amsler said they continued on down the road and that he was in a state of shock. By that time they had heard on the radio six or seven times that Frank Sinatra, Jr. had been kidnaped from South Lodge, Stateline. (R. 3067) At no time was Sinatra in the trunk.

They stopped for gasoline and Barry got out of the car for quite a while, maybe 15 minutes. He was afraid something had gone wrong. Up to this point he doesn't remember whether there was any conversation about Sinatra's ring. They were talking about the possibility of another roadblock and they couldn't understand why Sinatra wasn't recognized at the last roadblock. (R. 3065) Sinatra said he had a ring with his initials on it and some shart-eyed policeman might see it and that they would be sure to know it was his. (R. 3066)

During the night Frank Sinatra, Jr. slept. When they got to Canoga Park, he was told to cover his eyes and Amsler helped him out of the car and into the house. There was furniture in the bedroom, and just the two of them were there.

Amsler described their experiences at the house. From 9:30 until 6 o'clock on Monday he and Sinatra were alone. (R. 3073) During that time he was asleep in the late morning or part of the afternoon and he slept some of the other part of the day until 3 or 4 o'clock in the afternoon, when John Irwin came. Sinatra was awake when he woke up. Sinatra was on the bed and Amsler was laying on a mattress on the floor. (R. 3074) The side door was not locked. Irwin remained there that evening and Amsler slept about an hour. They all ate crackers, some sponge cake and some egg nog. (R. 3076)

Irwin left the house several times Tuesday, and

placed a phone call while he was in the bedroom with Frank. Frank talked to his father. Amsler did not talk to Sinatra, Sr.

While they were at the house they talked about their personal lives, about his being the son of Frank Sinatra, the good points and the bad ones. They talked about the publicity at that time. Amsler said this would be great for him and Sinatra, Jr. said "Well, I don't know. It's an awful big thing." Sinatra said he didn't expect it to be this big and he said it all depends on which way it's taken. (R. 3080)

Amsler said he was very much disturbed about what he heard on the radio and he spoke to Sinatra and said the thing seemed terrible to him and he was sorry he got involved. He said he was very disturbed and Frank said "We all got to get hold of ourselves or none of us will come out of this". Frank told him to get control of himself and started talking about Laurel and Hardy. (R. 3082)

When Keenan came back that night he said "You guys should have followed the plans. You should have gone directly by the plans." (R. 3083) Everything was arranged for letting Sinatra go that evening. Amsler and Irwin wanted to let him go because they were upset by the press and the radio. Everybody was very nervous. They discussed the matter of leaving Frank off. All of them were glad it was coming to a climax.

They discussed the fact that they might be caught and Frank said he probably would be the one that came down and bailed them out. (R. 3098) He said it to Amsler and Irwin. Prior to his leaving the house, Sinatra and Amsler shook hands, wished each other good luck and said they hoped they would meet again when things weren't in such an upheaval. Amsler had told Sinatra he would lay down his life for him, or words to that effect. Sinatra had said he wasn't worried about them but was afraid some policeman might come in and start shooting. He told Sinatra that before he would let anything happen to him, he would lay down his life. (R. 3100)

Amsler and Keenan went to Keenan's mother's house about 10 or 10:30. They went to Ronnie Bray's house and Keenan left some plans there. Amsler remained in the car. Keenan let Amsler out to pick up the money and said he would come back and pick him up. He was going to tell the courier to leave the money between two school busses. (R. 3091) Amsler became frightened by a taxi and another automobile and he ran off, vaulted a fence that surrounded the Veterans' Memorial Cemetery, went into Westwood and walked home to an apartment he used to have. (R. 3102) He stayed home until the next afternoon.

After a call from Keenan on Wednesday, Amsler took a taxi to Keenan's house. From there they went to

Irwin's house. Keenan and Irwin had all the money in the car. They went to Irwin's to discuss cleaning up the Mason Street house.

Amsler went to Dennis Gray's house, taking money in an attache case. He threw the money out on the floor. They took off the shoes and socks and tramped around in the money and they passed bundles of it around. They wanted to play Monopoly with real money. (R. 3110) He stayed at Dennis's house that night.

Keenan gave him $100. (R. 3113) Other than this, he had not taken any money. The first time he saw the money in the paper sack was when he got to Roger Dier's apartment.

On Friday, the 13th, representatives of the FBI came and took him to the downtown office of the FBI. He was interrogated there for he doesn't know how long , and then was taken to the Central Jail. Before going to the jail he was taken to a Commissioner and then was interviewed again. In other words, he first had an interview after he left Roger Dier's apartment and when he arrived at the FBI. (R. 3117) The interview lasted about an hour and then he was fingerprinted. Then he was taken to the Commissioner and then to jail.

He signed a statement (Exhibit 59) and he was pretty upset that night. He doesn't recall if this is the same statement or not, but he believes it is. He remembers that he was there at the early hours of that morning and

and he recalls being interviewed by the FBI and that the FBI wrote the statement and that he signed it at that time and that they incorporated the details in the statement. He doesn't remember talking much. They would ask him questions, he would answer, and they would take notes. He would say he was in a state of shock. (R. 3120)

Subsequently he was booked and there were other interviews with the FBI.

He next saw Keenan in March in the courtroom. They had a discussion about being freed on bail. Amsler told his attorney that it had already been taken care of, that Keenan was just waiting for himselt to be bailed out and that he would also be bailed out. He was angry with Keenan because he had'nt heard from anyone about bail. He wanted to know what was behind the whole thing. Keenan said he wanted it keep it a secret; that he, too, felt let down. Irwin also was angry.

He told about a man Keenan met in Las Vegas and with whom he became friendly. Keenan said the man approached him with the idea of the perfect crime. Amsler said Keenan told him he was supposed to plan this whole thing and the men that he got were not supposed to know that it was a publicity stunt. He related the things that Keenan had told him. It was supposed to inspire him with confidence, but it didn't.

Amsler said he was contacted by an attorney and a bail bondsman who told him that they would pay him $25,000 and attorney's fees and bail on the 14th of January. (R. 3136) There was also a writer. He reported the matter to the federal agents.

Amsler categorically denied that he had agreed and conspired to kidnap Frank Sinatra, Jr. (R. 3137) He denied that he conspired with Irwin and Keenan to make any calls to Frank Sinatra, Sr. for the purpose of obtaining the reward for the release of Frank Sinatra, Jr. He denied each and every one of the six counts.

NO. 19509

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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JOHN W. IRWIN,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

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FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

MANUEL L. REAL,
United States Attorney,
JOHN K. VAN DE KAMP,
Assistant U. S. Attorney,
Chief, Criminal Division,
DONALD A. FAREED,
Assistant U. S. Attorney,
Chief Trial Attorney,

600 U. S. Court House,
312 North Spring Street,
Los Angeles, California 90012,

Attorneys for Appellee,
United States of America.

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DONALD A. FAREED,
Assistant U. S. Attorney,
Chief Trial Attorney,

600 U. S. Court House,
312 North Spring Street,
Los Angeles, California 90012,

Attorneys for Appellee,
United States of America.

TOPICAL INDEX

TABLE OF AUTHORITIES

Constitution

Statutes

Rules

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APPELLEE'S BRIEF

I

STATEMENT OF JURISDICTION

Appellants, together with Barry W. Keenan, were indicted by the Grand Jury in and for the Southern District of California on January 2, 1964, for charges in six counts arising out of the interstate transportation of a kidnap victim, Frank Sinatra, Jr. [C. T. 2-10]. 1/

Pursuant to pleas of not guilty, trial by jury commenced on February 10, 1964. On March 7, 1964 the jury returned verdicts finding defendant Keenan guilty as charged in Counts I through VI inclusive [C. T. 328]; defendant Irwin guilty as charged in Count I

1/ "C. T." refers to Clerk's Transcript.

and Counts III through VI inclusive and not guilty as to Count II [C. T. 329]; and, as to defendant Amsler, guilty as charged in Counts I through VI inclusive [C. T. 182].

Defendants were sentenced as provided by law [C. T. 185, 190-193, 333, 368]. Separate appeals were taken by each defendant. Timely notices of appeal were filed by each of the defendants from the several judgments of conviction [C. T. 201, 345, 378]. Defendant Keenan on June 22, 1965 moved to dismiss his appeal and this Court ordered dismissal of the appeal on June 29, 1965.

The United States District Court for the Southern District of California had jurisdiction of the causes of action upon which the judgments appealed from were entered pursuant to Title 18, United States Code, Section 3231.

This Court has jurisdiction to entertain these appeals and to review the several judgments of the District Court pursuant to Title 28, United States Code, Sections 1291 and 1294[1].

II

STATUTES, RULES AND ORDERS INVOLVED

The indictment was brought under the following statutes which provide, in pertinent part, as follows:

Title 18, United States Code, Section 2 provides:

"(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

"(b) Whoever willfully causes an act to be done which

if directly performed by him or another would be an offense against the United States, is punishable as a principal."

Title 18, United States Code, Section 371 provides: "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both."

. . .

Title 18, United States Code, Section 875(a) provides: "Whoever transmits in interstate commerce any communication containing any demand or request for a ransom or reward for the release of any kidnapped person, shall be fined not more than $5,000 or imprisoned not more than twenty years, or both."

Title 18, United States Code, Section 1201 provides: "(a) Whoever knowingly transports in interstate or foreign commerce, any person who has been unlawfully seized, confined, inveigled, decoyed, kidnapped, abducted, or carried away and held for ransom or reward or otherwise, except, in the case of a minor,

by a parent thereof, shall be punished (1) by death if the kidnapped person has not been liberated unharmed, and if the verdict of the jury shall so recommend, or (2) by imprisonment for any term of years or for life, if the death penalty is not imposed."

"(b) The failure to release the victim within twenty-four hours after he shall have been unlawfully seized, confined, inveigled, decoyed, kidnapped, abducted, or carried away shall create a rebuttable presumption that such person has been transported in interstate or foreign commerce."

Title 18, United States Code, Section 1202 provides:

"Whoever receives, possesses, or disposes of any money or other property, or any portion thereof, which has at any time been delivered as ransom or reward in connection with a violation of section 1201 of this title, knowing the same to be money or property which has been at any time delivered as such ransom or reward, shall be fined not more than $10,000 or imprisoned not more than ten years, or both."

Judge East was designated by the Chief Judge of this Circuit to try this case pursuant to Title 28, United States Code, Section 292(b) which provides as follows:

"The chief judge of a circuit may, in the public interest,

designate and assign temporarily any district judge of the circuit to hold a district court in any district within the circuit."

Title 18, United States Code, Section 3432 provides: "A person charged with treason or other capital offense shall at least three entire days before commencement of trial be furnished with a copy of the indictment and a list of the veniremen, and of the witnesses to be produced on the trial for proving the indictment, stating the place of abode of each venireman and witness."

Rule 5(a) of the Federal Rules of Criminal Procedure provides:

"An officer making an arrest under a warrant issued upon a complaint or any person making an arrest without a warrant shall take the arrested person without unnecessary delay before the nearest available commissioner or before any other nearby officer empowered to commit persons charged with offenses against the laws of the United States. When a person arrested without a warrant is brought before a commissioner or other officer, a complaint shall be filed forthwith."

Rule 14 of the Federal Rules of Criminal Procedure provides:

"If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires."

Rule 17(b) of the Federal Rules of Criminal Procedure provides:

"The court or a judge thereof may order at any time that a subpoena be issued upon motion or request of an indigent defendant. The motion or request shall be supported by affidavit in which the defendant shall state the name and address of each witness and the testimony which he is expected by the defendant to give if subpoenaed, and shall show that the defendant cannot safely go to trial without the witness and that the defendant does not have sufficient means and is actually unable to pay the fees of the witness. If the court or judge orders the subpoena to be issued the costs incurred by the process and the fees of the witness so subpoenaed shall be paid in the same manner in which similar costs and fees are paid in case of a witness subpoenaed in behalf of the government."

Rule 41(e) of the Federal Rules of Criminal Procedure provides:

> "A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for use as evidence anything so obtained on the ground that (1) the property was illegally seized without warrant, or (2) the warrant is insufficient on its face, or (3) the property seized is not that described in the warrant, or (4) there was not probable cause of believing the existence of the grounds on which the warrant was issued, or (5) the warrant was illegally executed. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored unless otherwise subject to lawful detention and it shall not be admissible in evidence at any hearing or trial. The motion to suppress evidence may also be made in the district where the trial is to be had. The motion shall be made before trial or hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion at the trial or hearing."

Rule 53 of the Federal Rules of Criminal Procedure provides:

"The taking of photographs in the court room during the progress of judicial proceedings or radio broadcasting of judicial proceedings from the court room shall not be permitted by the court."

Order filed January 20, 1964, United States District Court, Southern District of California, in the matter of photographing, broadcasting, telecasting in court rooms, etc. [attached hereto as Appendix A].

Chapter II, Rule 3, Local Rules, United States District Court for the Southern District of California, "New Rules Governing Assignment" [Attached hereto as Appendix B].

III

STATEMENT OF THE CASE

On the morning of Friday, December 13, 1963, appellant Irwin telephoned the F. B. I. in San Diego. Shortly before midnight on the same day Barry Keenan and appellant Amsler were arrested in Los Angeles. Between 1:30 and 2:00 a. m. on Saturday, December 14, 1963, the F. B. I. contacted the United States Attorney and the United States Commissioner and Keenan, Amsler and Irwin were arraigned before United States Commissioners on a complaint filed that date which charged Barry W. Keenan and appellant Amsler, aided and abetted by appellant Irwin, with the interstate transportation of a kidnap victim, Frank Sinatra, Jr.,

in violation of Title 18, U.S.C. Sections 2, 1201.

On January 2, 1964 appellants Amsler and Irwin and defendant Barry W. Keenan were indicted in six counts [C.T. 2-10]. Count One charged conspiracy: to transport kidnap victim Frank Sinatra, Jr. in interstate commerce in violation of 18 U.S.C. §1201; to transmit interstate ransom communications in violation of 18 U.S.C. §875(a); and to possess ransom money from an interstate kidnapping in violation of 18 U.S.C. §1202; all in violation of 18 U.S.C. §371. The objects of said conspiracy were to kidnap, transport and obtain $240,000 in ransom money for the release of Frank Sinatra, Jr.

Some twenty-eight overt acts were listed as being among the overt acts committed by appellants to effect the objects of the conspiracy.

Count Two: charged Barry Keenan and appellant Amsler with the interstate transportation of kidnap victim Frank Sinatra, Jr. and charged appellant Irwin with aiding and abetting said violation in violation of 18 U.S.C., §§ 2, 1201.

Counts Three through Five inclusive: charged appellant Irwin with separate transmissions in interstate commerce of ransom communications and charged defendant Keenan and appellant Amsler with aiding and abetting said violations in violation of 18 U.S.C., §§ 2, 875(a).

Count Six: charged defendant Keenan and appellants Amsler and Irwin with the possession of ransom money from the interstate kidnapping of Frank Sinatra, Jr. in violation of 18 U.S.C. §1202.

On January 6, 1964 Barry W. Keenan, appellant Amsler and appellant Irwin were arraigned on said indictment in the United States District Court for the Southern District of California.

Between January 6, 1964 and February 10, 1964 numerous pre-trial motions were made, heard and ruled upon and Barry Keenan, appellant Amsler and appellant Irwin pleaded not guilty [C. T. 11-89]. Also, prior to trial there were hearings on some of the motions and pre-trial conferences were held [C. T. 11-90; Reporter's Transcript of proceedings January 6, 20, 27, 31; R. T. February 5, 10, 1964]. 2/

These motions and hearings thereon included defendants' motions for a bill of particulars; motion for psychiatric examination of defendant Amsler; motion for neuropsychiatric examination of Amsler; motion for psychiatric examination of defendant Keenan; Amsler's motion for production of statement made by defendant Amsler to the F. B. I.; motion of defendant Irwin to produce all statements unlawfully taken from the defendant; defendants' motions for reduction of bail; Amsler's motion for electroencephalographic examination of Amsler; Irwin and Amsler's motions for further bill of particulars; Amsler's motion for additional electroencephalographic examinations of Amsler; motions of defendants Amsler and Irwin to proceed in forma pauperis, to serve process without cost and to furnish the accused with a copy of the Reporter's Transcript without cost to defendants

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2/ "R. T." refers to Reporter's Transcript.

(the court held the defendants were indigents but each defendant was represented by counsel of his own choosing); defendant Amsler's motion to suppress evidence and statements; defendant Irwin's motion for return of seized property and suppression of evidence.

An extensive pre-trial hearing was held on defendants' motions to suppress the statements of Amsler, Irwin and Keenan, which motions were denied by the court. The Government made available to counsel for defendants on January 22, 1964, copies of the signed statements of each defendant and the letter dated October 24, 1963 by Keenan to "My parents and loved ones". Shortly thereafter the five reels of tape were also made available to them [Vol. I R. T. January 27, 1964 pp. 157, 158, 150-153, 490-494; see generally R. T. January 27-31, 1964 Vols. I-IV inclusive].

On February 10, 1964 jury trial commenced before United States District Judge William G. East. On March 7, 1964 the jury trial concluded and the jury returned its verdict, convicting appellant Amsler on all six counts [C. T. 182] and convicting appellant Irwin on Counts One, Three, Four, Five and Six and acquitting appellant Irwin on Count Two [C. T. 329]. At the conclusion of all the evidence in the case the court denied motions by all defendants for judgment of acquittal on all Counts One through Six [C. T. 159].

On March 13, 1964 Judge East sentenced appellant Amsler [C. T. 185-186] which sentence was subsequently reduced [C. T.

191-193]. On April 6, 1964 Judge East sentenced appellant Irwin [C. T. 368-369].

On March 31, 1964 appellant Irwin filed a motion for a new trial which was denied [C. T. 335-343; R. T. April 6, 1964, p. 40]. Appellant Amsler's motion to set aside the judgment was denied [C. T. 190].

Appellant Amsler filed his notice of appeal on March 11, 1964 [C. T. 194]. Appellant Irwin filed his notice of appeal April 6, 1964 [C. T. 345].

Over two years have elapsed since appellant Amsler filed his notice of appeal on April 7, 1964, during which time he has requested and obtained extensions of time as follows:

(1) Request for extension of time to docket and file Reporter's Transcript filed December 24, 1964.

(2) Request for extension of time to docket and file Reporter's Transcript filed January 25, 1965.

(3) Request for extension of time to file opening brief filed March 5, 1965.

(4) Request for extension of time to file opening brief filed April 9, 1965.

(5) Request for extension of time to file opening brief filed June 24, 1965.

(6) Request for extension of time to file opening brief filed July 20, 1965.

(7) Request for extension of time to file opening brief filed September 16, 1965.

(8) Request for extension of time to file opening brief filed October 29, 1965.

(9) Request for extension of time to file opening brief filed December 16, 1965.

Appellant Irwin filed timely notices of appeal and his present counsel was appointed to represent him on April 23, 1964. Since that time he has sought and obtained extensions of time as follows:

(1) Application for extension of time within which to file statement of points and appellant's opening brief filed April 26, 1965.

(2) Application for extension of time to file opening brief filed June 28, 1965.

(3) Application for extension of time to file opening brief filed July 23, 1965.

(4) Application for extension of time to file opening brief filed August 4, 1965.

(5) Application for extension of time to file opening brief filed September 23, 1965.

(6) Application for extension of time to file opening brief filed November 2, 1965.

Appellant Amsler's present counsel was his counsel throughout the trial and had access to a free copy of the "daily" transcript.

On December 27, 1965 appellee received appellant Amsler's opening brief which appellee moved to strike for non-compliance

with the Rules of this Court. Appellant Irwin's opening brief was received by appellee on January 7, 1966. Appellee's motion to strike appellant Amsler's opening brief was heard on January 31, 1966. The Court suggested that appellant Amsler's counsel confer with appellee's counsel and remedy the deficiencies of appellant Amsler's opening brief by correction, interlineation and filing the list of exhibits as required under Rule 18 of this Court. Following a conference of counsel on March 1, 1966 appellant Amsler on March 8, 1966 returned appellee's copy of the briefs with various changes and revisions which were not fully responsive to appellee's objections, set out in its motion to strike appellant Amsler's opening brief. On April 1, 1966 appellee was further advised by counsel for appellant Amsler concerning some of the matters which were the subject of appellee's objections to Amsler's opening brief and, to avoid further delay of this appeal, appellee advised this Court by letter dated April 7, 1966 to treat appellee's motion to strike appellant Amsler's opening brief as moot and on April 11, 1966, this Court denied the motion to strike as moot. Appellee's consolidated brief is in answer to the separate appeals of Irwin and Amsler by leave of this Court.

IV

STATEMENT OF FACTS

A. UNSUCCESSFUL ATTEMPTS TO KIDNAP THE VICTIM.

In October, 1963 3/ Barry Keenan, twenty-three years old, who had an unstable employment history, who was separated from his wife of about a year and was living at home with his mother, realized he was incapable of earning enough money to keep up with his debts and "high living", and decided to get rich quick while he was young and able to enjoy it. He was "willing to risk everything and ten to twenty years of his life" to amass a fortune by committing a major crime - kidnapping. His scheme is revealed in a letter he wrote "To My Parents and Loved Ones" which was sealed and placed in a safe deposit box shortly after it was written. The letter, dated October 24, 1963, read in part as follows:

> "If you read this letter I am either dead or under arrest for felony kidnapping. If I am convicted you must consider me as being dead as I will be in prison for at least ten years. Why? As you all know, money has always been of utmost importance to me. . . . After realizing that I was incapable of earning enough money to keep up with all my debts and high living I decided to take a carefully calculated risk by undertaking a major

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3/ Unless otherwise indicated, all the events in this sequence of facts took place over a period of approximately two months commencing October 24, 1963.

crime." [Ex. 60,Overt Act #1, Vol. I, C.T. 3, R.T. 2018, 2676-2679, Ex. 12, 12B, 12G].

Keenan considered several possible victims but finally settled on Frank Sinatra, Jr. (hereafter referred to as Sinatra, Jr.), because Keenan knew Sinatra, Jr.'s father had ready access to large sums of money. Keenan wanted confederates to help him carry out the crime. He sought out his high school friend, appellant Amsler, twenty-three, a scuba diver and ex-boxer. He also talked to appellant Irwin, an older man of 42, a self-employed house painter by trade, who had been Keenan's mother's boy friend in 1957 or 1958, with whom Keenan and his mother had spent some time in Mexico. At various times during the weeks preceding the kidnapping Keenan discussed plans for the crime with appellants Irwin and Amsler and both agreed to participate [R.T. 2743-2744, 2757-2758, 2782, 3218, 3231, 3247, 3692; Ex. 61, Ex. 59, Ex. 58].

In late October Keenan attempted unsuccessfully to obtain guns in Mexico. Keenan learned that Sinatra, Jr., twenty years of age and a professional singer with the Tommy Dorsey orchestra, was appearing at the Arizona State Fair in Phoenix, Arizona. Keenan went to Phoenix alone on October 29th, bought two hand guns there, rented a house and arranged for a telephone under a fictitious name at 717 West Lynwood, Phoenix, which was to be used as a hideout where the victim was to be held. Appellant Irwin took a bus to Phoenix a day or two later where both Keenan and Irwin observed Sinatra, Jr. in his daily activities at the Fair.

They decided not to kidnap Sinatra, Jr. in Phoenix for various reasons including the fact that Phoenix was too isolated and there were no long distance direct dialing facilities by which to contact the victim's father [Ex. 61, pp. 2-4; Ex. 9, Ex. 10, Ex. 23, Ex. 43, Ex. 44; R. T. 2021-2026, 2115, 2696-2697, 2700, 3253, 3520-3522].

On November 15th Keenan learned that Sinatra, Jr. was appearing at the Ambassador Hotel in Los Angeles. He contacted Irwin and Amsler, who also was persuaded to take part in the kidnapping. Keenan, under the fictitious name of Frank Long, rented a house on Mason Avenue, Canoga Park, California, where the victim was to be held following the kidnapping, moved in furniture and had a telephone and extension installed. On November 21st, Keenan, using the fictitious names Bill Keane and Robert Allen, rented a room in a Hollywood motel where appellant Irwin and appellant Amsler met and stayed on November 29th. President Kennedy's assassination precipitated a postponement of the kidnapping [Ex. 14, Ex. 25, Ex. 40A, Ex. 61, pp. 6-8. R. T. 2037-2039; R. T. 1762-1771, 2754-2755, 3260-3276; Ex. 21, Ex. 21A, Ex. 22C; see Overt Acts #2 through #5, Vol. I, C. T. 3].

They next set November 29th as the date for the abduction and it was just a few days before this that Irwin and Amsler met for the first time. Prior to this time Keenan, who "master-minded" the crime, had always dealt with them separately. They each knew of the other's existence as "John" and "Joe" but had not met in person. They surveilled Sinatra, Jr. 's apartment for a few

days but observed he was brought home in the company of members of the orchestra and they decided not to kidnap him there. On December 3rd Keenan called Mrs. Tommy Dorsey in Miami, Florida from the Mason Avenue hideout and learned from her that the Dorsey Band with whom Sinatra, Jr. was singing was playing at the Harrah's Club, Stateline, California.

Keenan and Amsler left Los Angeles the next day, December 4th, for Stateline, California in Keenan's rented car to kidnap Sinatra, Jr. there. They had two guns with them. Enroute to Stateline from Bishop they had checked their return route from Nevada into California in order to avoid passing through any California Agricultural check stations at the California state line. They also practiced firing the .32 automatic. On December 5th they arrived in Stateline, California (Lake Tahoe) where they checked into Harvey's Hotel under the fictitious names Robert Allen and Joseph Gardiner. Amsler and Keenan the following two days occupied their time observing Sinatra, Jr.'s location and movements. During the afternoon of December 8th the license plates which were on Keenan's rented car were removed and another set installed [R.T. 2701, 2757-2760, 2803, 3279-3281, 3287-3288, 3293-3296, 3303-3311, 3322-3323; Ex. 6A, Ex. 6B, Ex. 20A, Ex. 26B, Ex. 26D, Ex. 26H, Ex. 26I, Ex. 40F].

B. THE KIDNAPPING.

At 8:30 p. m. on December 8th, Keenan called Sinatra, Jr. 's room at The Harrah's Club, using a fictitious name, Rex Harrison, to make certain that Sinatra, Jr. was in the room and at about 9:00 p. m. Keenan and Amsler, both carrying guns, entered Sinatra, Jr. 's room under the ruse of delivering a package to Sinatra, Jr. At gunpoint they forced John Foss, who was with Sinatra, Jr., to lie on the floor where they taped his hands and eyes. At gunpoint, they took $20 from Sinatra, Jr. 's wallet, forced him to dress and abducted him from his room to Keenan's car where they made him take two sleeping pills and ordered him to lie down in the rear seat of the car and place a black cloth mask over his eyes. It was snowing heavily. They drove north into Nevada on Highway 54 for about half an hour during which time Sinatra, Jr. was led to believe, from a conversation between Keenan and Amsler staged for the victim's benefit, that they were parolees "risking a jail sentence for twenty bucks" and that he was being taken as a hostage so that they could make their getaway and that they were going to release him [R. T. 435-440, 449, 526-548, 2243, 2736, 3176, 3355, 4076-4077; Ex. 1, Ex. 4, Ex. 58, Ex. 59].

John Foss meanwhile had the police alerted. As they approached a police roadblock Sinatra, Jr. was told "we are coming to a roadblock. You lie in the back seat there and pretend that you are asleep and play it cool and nobody will get hurt." It was after 9:00 p. m. They were driving on a deserted unlighted road in a blinding snowstorm. They stopped the car several

hundred yards short of the roadblock, appellant Amsler left the car and, as the evidence showed, he panicked and hid in a snow-bank. Keenan threw his gun away and as his car was approached by Nevada police officers, Keenan busied himself with removing his tire chains. Amsler had kept his gun. Sinatra, Jr. could not see Amsler and Keenan after they got out of the car and could only hear voices. Sinatra, Jr. was in constant fear for his life had he failed to follow directions and just before the roadblock did not know that Keenan had thrown away his gun [R. T. 439, 545-548, 559, 633, 647-648, 939, 949, 1424-1426, 2740-2741, 3054, 4073-4074, Ex. 4, Ex. 27].

After police officers had looked the car over and left, Keenan told Amsler to get into the trunk of the car. Amsler obeyed and they proceeded to the roadblock where they were stopped for a few seconds. Then they drove south on Highway 395 through Nevada and on to the Mason Avenue house in Canoga Park, California, where Sinatra, Jr. was taken on December 9th about 9:00 a. m. the next morning and held captive. Sinatra, Jr. was told for the first time on December 9th about 9:00 a. m. at the Mason Street House that he was involved in a "major kidnapping", that its purpose was to obtain money from his father and that he would be held captive by Keenan, Amsler and Irwin until the money was delivered [R. T. 559, 572-576, 2736-2747, 2779, 4076-4077].

Irwin, during the time Keenan and Amsler had been at Stateline and enroute to the Mason Avenue hideout, had been in contact by telephone with Keenan. After Keenan and Amsler

arrived with the victim at the Mason Avenue hideout, Keenan telephoned Irwin, told him they had Sinatra, Jr. and to meet them at the Mason Avenue house. When Irwin arrived he agreed to make the ransom calls to Sinatra, Sr. for which Irwin was to receive a $50,000 share of the ransom. Appellant Amsler was also to receive $50,000 for his part in the kidnapping. Keenan and appellant Irwin drove to a car rental agency at the Beverly Hilton where Keenan rented a car and about 6:00 p.m. Keenan drove back to Stateline to check out of the room which Keenan and Amsler had occupied at Harvey's Hotel [R.T. 2049-2054, 2414, 2736-2744, 3070, 3825-3828, Ex. 13A, Ex. 13B, Ex. 13C, Ex. 26L, Ex. 37C, Ex. 58, p. 8, Ex. 59, Ex. 61; see Overt Acts #9 and #10, Vol. II, C.T. 3].

C. THE RANSOM CALLS.

Sinatra, Sr., when he heard on the evening of December 8th that his son had been kidnapped, flew from his home in Palm Springs to the Mapes Hotel in Reno, Nevada where he met F.B.I. agents. Keenan had given appellant Irwin instructions as to the ransom demand telephone calls to be made to Frank Sinatra, Sr. Prior to receiving the telephone calls herein referred to, Frank Sinatra, Sr. had consented in writing, with his counsel's approval, to the recording by the F.B.I. of any calls he received. Following the telephone call from Irwin to Reno at 4:45 p.m. on December 9th (at which time Irwin told Sinatra, Sr. that his son was in Irwin's custody), Irwin, assisted by Amsler, on December 10th

made the following telephone calls from the Mason Avenue house, where he was standing guard over the victim, who was held captive nearly fifty-two hours. These calls related to the demand for ransom for the release of Sinatra, Jr. [R. T. 1318-1330, 3837, 3847-3852, Ex. 61; see Overt Act #12, Count One of the indictment, Vol. II, C. T. 4]. [A summary of the ransom demand calls indicating the time of the call, party called, source of call and subject discussed is attached as appellee's Appendix C].

(1) At 9:05 a. m. Irwin to Sinatra, Sr. at the Mapes Hotel, Reno, Nevada. The father was allowed to speak with his son and was told to expect further calls [R. T. 1320, 1674-1677, 3833, 3840-3842, Ex. 40F, Ex. 61, p. 14, 14, Ex. 160. See Overt Act #13 of Count One and Count Three of indictment, Vol. II, C. T. 4, 6].

(2) At 11:40 a. m. Irwin to Sinatra, Sr. at the Mapes Hotel. Sinatra, Sr. was not available and the call was taken by his attorney who was told that there would be a call later [R. T. 3845, 1680, Ex. 168, Ex. 40F, Ex. 61, p. 15. See Overt Act of Count One of indictment, Vol. II, C. T. 4].

(3) At 11:50 a. m. Irwin to Sinatra, Sr. at the Mapes Hotel at which time Sinatra, Sr. was told to go to Ron's Service Station. Sinatra, Sr. complied [R. T. 3845, 1682, 1685, 1687, Ex. 40F, Ex. 162, Ex. 61, p. 16. See Overt Act 15 of Count One of indictment, Vol. II, C. T. 4].

(4) At 12:28 p.m. Irwin to Sinatra, Sr. at the Mapes Hotel. Sinatra, Sr.'s attorney was told of the mistake in address as to Ron's Service Station (being located in Carson City rather than Reno) which the caller had given Sinatra, Sr. [R.T. 3850, 1682, 1687-1688, Ex. 40F, Ex. 169, Ex. 61, p. 16. See Overt Act #16 of Count One of indictment, Vol. II, C.T. 4].

(5) At 12:50 p.m. Irwin to Sinatra, Sr. at Ron's Service Station, Carson City, Nevada, and demand for ransom of $240,000 in specified denominations. Frank Sinatra, Sr. was told to go to Oxoby's Station in Carson City where he would receive another call. Again Sinatra, Sr., following instructions, went to Oxoby's Station. F.B.I. agent Elson was with Sinatra, Sr. [Ex. 180, R.T. 3850, 1335-1341, Ex. 40F, Ex. 48. See Overt Act #17 of Count One and Count Four of indictment, Vol. II, C.T. 4, 8].

(6) At 1:10 p.m. Irwin to Sinatra, Sr. at Oxoby's Station when Sinatra, Sr. was told to obtain a courier to handle the ransom payment. He was asked the telephone number of Mrs. Nancy Sinatra at Bel Air, California and was told that he would be called again at 9:00 p.m. at the home of Mrs. Sinatra in Bel Air. Sinatra, Sr. left Reno with the F.B.I. and went to the Bel Air home of Mrs. Sinatra [R.T. 1341-1345, 3840, 3842, 3845, 3851, 3898, 3224-3229, Ex. 40F, Ex. 61, pp. 17, 18. See Overt Act #18 of Count One and Count Five of indictment, Vol. II,

C. T. 3, 9].

(7) At 9:26 p. m. Irwin to Sinatra, Sr. at Mrs. Nancy Sinatra's residence. Sinatra, Sr. was told to go to the Standard Station at Camden and Santa Monica Blvd., Beverly Hills, California where he would receive the next call. He complied [R. T. 1349, 1714-1717, Ex. 61, p. 19. See Overt Act 19 of Count One of indictment, Vol. II, C. T. 4].

(8) At 9:57 p. m. Irwin to Sinatra, Sr. at the Standard Station at Camden and Santa Monica Blvd. in Beverly Hills when Sinatra, Sr. was told to have the courier with the money ($240, 000) go to a specified telephone at Los Angeles International Airport where the courier would be contacted. The caller would identify himself as "John Adams" and the courier would respond as "Patrick Henry". Sinatra, Sr. arranged for the ransom money to be delivered by an F. B. I. agent who was the courier [7 R. T. 1350-1353, 1326, Ex. 61, p. 19. See Overt Act #20 of Count One of indictment, Vol. II, C. T. 4].

D. RECEIPT OF THE RANSOM MONEY

During the period that appellant Irwin had made the series of ransom calls to Nevada, Keenan had checked out of Harvey's Hotel in Lake Tahoe and had returned to the Mason Avenue house at about 9:00 p. m. on December 10. Irwin was to guard the victim while Keenan and Amsler picked up the ransom money. Following

instructions by telephone which Keenan gave to an F. B. I. agent who was acting as courier, both having identified themselves by the fictitious names selected by Keenan, the ransom money was left between two buses parked at a Texaco Station about 12:25 a. m. the morning of December 11. At about that time appellant Amsler was dropped off at the Texaco Station to pick up the ransom. Amsler panicked and ran off without picking up the money. Keenan picked up the ransom money about 12:45 a. m. and called appellant Irwin at the Mason Avenue hideout, told him Amsler had disappeared, that he (Keenan) had picked up the money himself and told Irwin to wait with Sinatra, Jr. until Keenan arrived. Appellant Irwin decided not to wait and drove Sinatra, Jr. blindfolded to the Mulholland Drive turnoff on the San Diego Freeway and released him. Sinatra, Jr. walked towards his mother's home and was picked up by a Bel Air patrolman who returned him to his parents' home. The victim testified that at no time during the fifty-two hour period following the kidnapping was he ever convinced that he could have successfully escaped without endangering himself or someone else's life [R. T. 588-591, 600-606, 1339, 1568-1588, 2745-2746, Ex. 40F, Ex. 167, Ex. 58, pp. 9-10, Ex. 61, Ex. 78, Ex. 80. See Overt Acts #21, #24, #25 and #26 of Count One of indictment, Vol. II, C. T. 4, 5].

Over the next several days appellant Amsler met Keenan at the home of Keenan's mother and Amsler and Keenan then went to Irwin's house and gave Irwin his $50,000 share of the ransom. Keenan and appellant Amsler made arrangements to rent a house in Glendale to use as a hideout. Keenan and Amsler bought a car which they took to appellant Irwin's house. Irwin out of fear of apprehension fled the city in this car and headed South. He stopped overnight on December 12 at his brother's home in San Diego. It was from his brother's home that he called the F. B. I. the next morning, on December 13, and offered to give himself up. He had most of his share of the ransom with him. Keenan was arrested about 11:00 p. m. that night and assisted in leading the F. B. I. to Amsler who was arrested about an hour later at Roger Dier's residence where the major portion of the ransom money was recovered [R. T. 2418-2427, 2289-2299, 3418, 3420, 3597-3598, Ex. 61, pp. 24-26, Ex. 58. See Overt Acts #27 and #28 of Count One and Count Six of indictment, Vol. II, C. T. 5, 10, R. T. 2783, 2691, 2748-2752, Ex. 78, R. T. 2545-2546, Ex. 85C, Ex. 85D, R. T. 2548-2552, 2564-2569, 2583, 2587-2588, 2607, Ex. 85C, Ex. 85D].

E. IRWIN'S ADMISSIONS

Irwin's brother, a retired navy veteran and school teacher, testified that on the morning of December 13th, Irwin told him "that he had become involved in the Sinatra kidnapping and that he had been carrying it and was sick and tired of it and wanted to turn

himself in and be through with it" [R. T. 2289]. He told his brother, "I have some of the money out in my car" and " . . . I am the one who made all the telephone calls to Frank, Sr. . . ." [R. T. 2292]. Before calling the F. B. I. Irwin's brother suggested that Irwin contact an attorney but they were not able to reach him. They then decided to call the F. B. I. [R. T. Vol. I January 27 & 31, 1964, pp. 47, 50]. Irwin and his brother then discussed the "best way to terminate his participation in this whole business" and his brother told him to " . . . call the local F. B. I. and let them take care of it". Irwin's brother sometime between 8:15 and 8:30 a. m. [R. T. 2295] placed the call from his house to F. B. I. agent Mitchell with appellant Irwin on the extension phone [R. T. 2293], identified himself to agent Mitchell and told Mitchell " . . . that it was not any kind of crank call or a hoax, that it was an actual fact that my brother had become involved in the Sinatra kidnapping, he wanted to surrender himself . . .". Appellant Irwin broke into the conversation and told the F. B. I. over the phone that he had some money from the kidnapping in the automobile parked in front of the house. Irwin then telephoned his wife and told her he was "surrendering voluntarily" [R. T. 2411].

At about 9:00 a. m. F. B. I. agents Mitchell and Moore arrived at the house [R. T. 2296-97]. Mitchell identified himself to Irwin and his brother as an F. B. I. agent. Irwin gave Mitchell the keys to his car and told Mitchell "inside the station wagon you will find the money, the share of the money that was given to me". At that point Mitchell advised Irwin that he did not have to make a

statement and that any statement he did make could be used against him in a court of law and that he had the right to consult an attorney if he desired [R. T. 2409]. Irwin said he didn't want an attorney, that what he wanted to do was to "straighten out his relationship to the Sinatra case" [R. T. Vol. I, January 27, 1964, pp. 57, 103].

Accompanied by appellant Irwin, agent Mitchell removed two suitcases and an attache case from the car. Irwin told him the attache case contained the money. Mitchell opened it, observed it was "filled with currency" then closed it and handed it to another agent who had arrived at the scene [R. T. 2410-2411, Ex. 42].

Irwin told Mitchell in his brother's presence that he " . . . wanted to make a clean breast of this situation, that he had informed his wife by telephone that he had called the F. B. I. to advise them that he was surrendering himself" [R. T. 2411].

About 9:10 a. m. Irwin agreed to accompany F. B. I. agents Mitchell, Moore and Flynn to the San Diego office of the F. B. I. The trip took between 15 and 20 minutes [R. T. 2411-2412, 3673]. During the ride, Irwin reiterated that he wished to "make a clean breast of this matter" but he did not want to name the other individuals that he knew were involved. He then made a series of admissions covering the principal facts as to his participation in the crime including the fact that he was prevailed upon to participate in the crime, had made all the telephone calls to the victim's father, Frank Sinatra, Sr., and had come into possession of nearly $50,000 which was in the attache case [R. T. 2414-2418, Ex. 42].

They arrived at the F. B. I., San Diego office, at about

9:30 a. m. at which time, in the garage area of the F. B. I. office building, he permitted the F. B. I. to search him for harmful weapons or drugs at which time he turned over to the F. B. I. a gold signet ring which he said belonged to Frank Sinatra, Jr. which he had promised he would return to him. Irwin was then taken upstairs into an office area where he was seated. Prior to interviewing him shortly before 10:00 a. m. he was advised of his rights, i. e. that he did not have to make a statement, that anything he said could be used against him, and of his right to consult an attorney. Irwin acknowledged he had been advised of his rights. There were numerous "breaks" throughout the period of the interview for coffee, toilet relief, lunch, dinner, etc. The period of actual questioning covered approximately 3-1/2 to 4 hours [R. T. 2419-2421, 2448, Ex. 34, Vol. I, R. T. January 27, 1964, 118-124, 128, 151].

Three F. B. I. stenographers took dictation from Irwin and agents Field and Armstrong. The contents of a 27-page statement were transmitted to the F. B. I. office in Los Angeles. The completed statement was typed up by approximately 10:00 p. m. that evening. It was handed to Irwin who was asked to read it. Irwin declined to read it at that time. He decided to wait until the next day. At about 10:00 p. m. Irwin went to another room in the F. B. I. office building where a couch was provided and where he slept a few hours. A few minutes before 3:00 a. m. Irwin was escorted from the F. B. I. office to the office of the U. S. Commissioner in San Diego where he was arraigned at 3:00 a. m. The U. S. Commissioner advised him of his rights and bail was fixed. At about 3:20 a. m. he

was booked at the San Diego County Jail [R. T. 3674-3675].

At 7:30 a. m. F. B. I. agents interviewed Irwin at the San Diego County Jail. The 27-page typed statement Irwin then read. He made corrections on two pages which were transmitted to the F. B. I. office, retyped, returned to Irwin, read and approved by him. He then signed the statement about 11:00 a. m., initialling each page and all corrections [Ex. 61, Ex. 90, R. T. 2453-2459, Vol. I, R. T. of January 27 and January 31, 1964, pp. 53-70, 72-73, 77-78, 99-107, 118-130, 146-153].

F. AMSLER'S ADMISSIONS

At about midnight of the same day that appellant Irwin telephoned the F. B. I. in San Diego, agents, accompanied by Keenan, found appellant Amsler at Roger Dier's apartment in Los Angeles. Keenan had been arrested a little over an hour before, about 11:00 p. m., and had assisted the F. B. I. in locating Amsler. While the F. B. I. agents were in the apartment and after Keenan had found and turned over substantial portion of the ransom money, Amsler was placed under arrest at which time he was advised of his rights including his right to counsel. He was not handcuffed. The time of Amsler's arrest was shortly after midnight on December 13 [Vol. II, R. T. January 27, 1964, 193-223, 267-277, Ex. 58, R. T. 2567-2569].

Keenan and Amsler were driven to the Los Angeles office of the F. B. I. During the ride Amsler told the F. B. I. agents how he and Keenan were able to get through the roadblock and that

Keenan had given him a gun which he, Amsler, had held on Sinatra, Jr.

Amsler and the F. B. I. agents arrived at the F. B. I. offices shortly after 1:00 a. m. where Amsler was turned over to other agents for photographing and finger printing. Agent Simon, between 1:30 and 2:00 a. m. called the United States Attorney and the United States Commissioner. A complaint was prepared against all three defendants and the Commissioner agreed to come down for the arraignment as soon as he could although he was not well. Amsler was interviewed starting about 2:10 a. m. when on his request he was given cigarettes and refreshment. At 2:22 a. m. the admonition as to his rights, including the right to counsel, was reiterated. The interview continued for approximately 45 to 50 minutes at which time F. B. I. agent Russell began preparation of the statement which Amsler read, corrected, initialled and signed about 3:25 a. m. No threats or promises were made to Amsler. Amsler testified at the trial that the statements he made which are contained in a two-page statement in his own handwriting were made of his own free will and that he was not subjected to pressures, threats or promises [Vol. II, R. T. January 27, 1964, 200-214; R. T. 2574, 2725-2728, 2736-2737; 3119, 3174-3175, Ex. 59].

At about 3:32 a. m. Amsler was taken before the U. S. Commissioner, arraigned on the complaint, advised of his rights and bail was fixed. Following his arraignment Amsler was taken to the detective headquarters of the Los Angeles County Sheriff's office, arriving there at 4:20 a. m. The F. B. I. agents interviewed him,

after he was given water and a carton of milk, until about 5:30 a. m. Shortly after the F.B. I. left Amsler, Amsler retained counsel who, on several occasions, advised Amsler to continue to cooperate with the F. B. I. [R. T. 2720-2722, 2738-2756, Vol. II, R. T. January 27, 1964, 232-257].

G. KEENAN'S ADMISSIONS

When Keenan was arrested in La Canada, California about 11:00 p. m. on December 13, an F. B. I. agent advised him of his rights, i. e. that he did not have to make any statements, that if he did it could be used against him and of his right to counsel. Keenan admitted the kidnapping and told the F. B. I. agents he had left the major portion of the ransom money at Roger Dier's apartment in Culver City where he had stayed the previous night. He volunteered to direct the F. B. I. to the location. Enroute he made a series of admissions as to the crime. When they arrived at the Dier apartment in Culver City at Keenan's request the F. B. I. provided him with a quart of milk. He told the F. B. I. agents that Amsler had spent the previous night with Keenan at the Dier apartment. Once they were in the apartment Keenan volunteered to get the ransom money contained in a tin box and paper bag. Dier and Keenan had executed a waiver of search of the apartment [Vol. II, R. T. January 27, 1964, 194-209, R. T. 2564-2601].

Keenan about half an hour after arriving at Dier's apartment was driven to the Los Angeles office of the F. B. I. where they arrived shortly after 1:00 a. m.

Agent Simon, between 1:30 and 2:00 a. m. contacted the United States Attorney and U. S. Commissioner (see supra, p. 31). Keenan was interviewed starting about 1:35 a. m. At the inception of the interview he was advised of his rights and so acknowledged. The interview was interrupted for fingerprints and photographing and toilet relief. An agent took notes of the interview. An eleven page statement in an agent's handwriting was prepared which Keenan read and corrected in several particulars. He then initialled the corrections, each page of the statement and signed the statement. About 3:32 a. m. Keenan was taken before the U. S. Commissioner, arraigned on the complaint, advised of his rights and bail was fixed. No threats or promises were made to Keenan and Keenan so acknowledged.

Following his arraignment Keenan was taken to the detective headquarters of the Los Angeles Sheriff's office where he was interviewed by the F. B. I. for a little over an hour. On at least two occasions after December 14, and after Keenan retained counsel, his attorney advised Keenan to cooperate with the F. B. I. and to "furnish any information he could about the matter" [Vol. II, R. T. January 27, 1964, pp. 267-275; R. T. 2620-2640, Ex. 58].

V

ARGUMENT

A. THE DISTRICT COURT DID NOT LACK JURISDICTION BECAUSE THE JUDGE WHO PRESIDED OVER THE TRIAL AND HIS STAFF WERE OF A DIFFERENT DISTRICT.

Appellant Amsler asserts that "the trial and all proceedings had were void for lack of jurisdiction of the trial court because the trial, as such, with an Oregon judge and an Oregon staff maintaining the court, was not a trial within the state and district where the alleged crime was committed . . ." [Amsler Op. Br. pp. 19-26].

This contention is devoid of merit and the trial judge properly so ruled, finding that under Acts of Congress Title 28 U. S. C. primarily §292(b), it is provided as follows:

> " . . . the chief judge of a circuit may in the public interest designate and assign temporarily any district judge of the circuit to hold a district court in any district within the circuit. The Chief Justice's Advisory Committee upon assignment of District Judges, primarily in the field of inner-circuit assignments dealing as well with intra-circuit assignments of District Judges, has provided that a District Judge of the United States owes the primary duty to his own district and then under the Acts of Congress a secondary duty to the other districts

within his own circuit and then thirdly, where his services might be required by the Chief Justice, in other circuits and in other districts of other circuits."

On August 6, 1963 Chief Judge Chambers issued this designation:

"Whereas in my judgment the public interest so requires, now, therefore, pursuant to the provisions of §292(d), 28 U.S.C., I do hereby designate and assign the Honorable William G. East, United States District Judge for the District of Oregon, to hold a district court in the Southern District of California during the period beginning January 2, 1964, and ending January 31, 1964, and for such further time as may be required to complete unfinished business." [Court's Exhibit No. 1, Vol. A, Reporter's Transcript of Proceedings, January 20, 1964, pp. 2-6.]

Pursuant to the rules adopted by the judges of this court and the provisions of paragraph 8 of said order filed February 10, 1953 it was ordered that the subject case be transferred for all purposes to the Honorable William G. East sitting by general assignment in this district under provisions of Title 28 U.S.C. §292(b) [Court's Exhibit No. 2, Reporter's Transcript of Proceedings, January 20 at pp. 2-7, C.T. 219].

Appellant Amsler in effect challenges the power of congress

to provide that the judges from one district perform functions in another district, attacking the unconstitutionality of Title 28 U.S.C. §292. He cites no case so holding. This is not surprising in that the power of Congress to provide that judges from one district perform functions in another district has, on the few occasions on which it has been challenged, been sustained. McDowell v. United States, 159 U.S. 596, 598 (1895); Lamar v. United States, 241 U.S. 103 (1916). See also Judge Yankwich's article entitled, "Assignment of Judges to Other Districts", 3 F.R.D. 481. Appellant Amsler's counsel conceded in the court below that he was able to find no authority to the contra and he has cited none to the court here [Reporter's Transcript of Proceedings, January 20, 1964 at p. 8; Reporter's Transcript of Proceedings of April 6, 1964, p. 7]. As to Amsler's argument that the Oregon clerk was not authorized in California to administer oaths at the time that oaths were administered to the prospective jurors, this court should take note of the fact that the trial judge "out of an abundance of precaution" himself administered the oath to the jury [Reporter's Transcript of Proceedings, February 11, 1964, pp. 4-5].

B. THE INDICTMENT WAS NOT DUPLICITOUS.

Appellant Amsler contends that the indictment is duplicitous, arguing that Title 18 U.S.C. §1201, in effect, repealed Title 18 U.S.C. §371 [Amsler Op. Br. pp. 57-59; R.T. 3981-3982]. This contention is without merit. Defendants were charged under Title

18 U.S.C. §371, which carries a lesser penalty than the conspiracy provision in §1201. Obviously Title 18 U.S.C. §1201 cannot be said by implication to have repealed 18 §371 [R.T. 3982], United States v. Bazzell, 187 F.2d 878 (7th Cir. 1951), cert. den. 342 U.S. 849, 889 (1951). Furthermore, §1201(c) of Title 18 deals only with a conspiracy as to interstate transportation; whereas the indictment charges, in Count One under 18 U.S.C. §371, a conspiracy in violation of 18 U.S.C. §875(a) i.e. transmitting in interstate commerce communications demanding and requesting ransom and reward for the release of kidnap victim Frank Sinatra, Jr. and in violation of Title 18 U.S.C. §1202 i.e. receiving, possessing and disposing of ransom money to be delivered for the release of kidnap victim Frank Sinatra, Jr. after he was kidnapped and transported in interstate commerce. Neither of these offenses is covered in the conspiracy provision of 18 U.S.C. §1201 [R.T. 3283-3284; Reporter's Transcript of April 6, 1964, p. 34].

Thus the statutes in question describe different offenses. Repeals by implication are not favored. See Cohen v. United States, 201 F.2d 386, 393 (9th Cir. 1953).

Appellant Amsler's reliance on Kotteakos v. United States, 328 U.S. 750 (1946) [Amsler's Op. Br. pp. 58, 59] is misplaced. In Kotteakos the indictment alleged one conspiracy. The proof showed eight separate conspiracies connected only by the presence of one man in each. The Government conceded the variance in proof which the Supreme Court held was prejudicial to the defendants. Kotteakos, supra, p. 776. Kotteakos, obviously, is not in

point.

C. THE COURT DID NOT ERR IN DENYING DEFENDANT'S REQUEST FOR NAMES AND ADDRESSES OR PROSPECTIVE JURORS AND WITNESSES PRIOR TO TRIAL.

Appellant Amsler alleges that the court committed prejudicial error in refusing to give the defendant the names and addresses of all prospective jurors three days prior to trial under Title 18 U.S.C. §3432. He blandly assumes that "Title 18 U.S.C. §1202, the kidnapping statute, is a capital statute" [Amsler's Op. Br. p. 51]. This is not the law. Where the kidnapping victim is liberated by defendants in an unharmed condition, the death penalty could not have been imposed. The subject indictment did not plead that the victim was in any way harmed. Amsler's counsel conceded there was no injury to "anyone involved in this matter" [R. T. January 20, 1964 at p. 77]. Thus, no "capital offense" was involved within the meaning of §3432 of Title 18. Brown v. Johnston, 126 F.2d 727 (9th Cir. 1942), cert. den. 317 U.S. 627; United States v. Parker, 103 F.2d 857 (3d Cir. 1939), cert. den. 307 U.S. 642; United States v. Poitras, 339 F.2d 428 (4th Cir. 1964).

D. THERE WERE NO ILLEGAL SEARCHES OR SEIZURES AS CONTENDED BY APPELLANT AMSLER 4/.

Appellant Amsler misstates the record in referring to a search of Irwin's house [See Motion to Suppress, Vol. I, January 27 and 31, 1964, p. 41]. He does not specify what evidence of such alleged search of the house was "illegally used against Amsler" or how. No reference is provided to the record as what evidence, if any, of such search was being offered against Amsler [Amsler's Op. Br. p. 72, Vol. I, January 27, 1964, p. 40]. Rule 41(e), Federal Rules of Criminal Procedure.

What the record does reflect is obvious probable cause - that Irwin told the F. B. I. over the phone that he had some of the ransom money in an automobile parked in front of his brother's house. After they arrived, he handed Agent Mitchell the keys to his car and told him that Mitchell would find Irwin's share of the ransom inside the station wagon [R. T. 2409-2411]. When Irwin arrived at the F. B. I. San Diego office, he consented to a search [R. T. 2419-2421, 2448; Appellee's Statement of Facts, supra, p. 29].

Following an extensive hearing on the Motions to Suppress, the trial court was satisfied there was no illegal search [R. T. Motion to Suppress, January 31, 1964, pp. 487-492. See generally Vols. I-IV, R. T. January 27 & 31, 1964]. There can be no question

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4/ We note that, although Amsler's argument is based on the "search of Irwin's house", appellant Irwin does not raise the point.

under the facts in this case as to probable cause. Brinegar v. United States, 338 U.S. 160 (1949); Husty v. United States, 282 U.S. 694 (1931).

E. THE COURT DID NOT ERR IN DENYING AMSLER'S MOTION FOR A TRIAL SEVERANCE.

Both appellants moved in the court below for a severance of the trial as to each defendant [C. T. 298]. The motions were denied by the trial court [R. T. February 10, 1964, p. 111]. We note that appellant Irwin does not include this as a specification of error nor does he argue this point in his appeal. Appellant Amsler's argument contains no reference whatsoever to the record and he makes no showing of any abuse of discretion other than his generalization that denial of a separate trial " . . . was of great prejudice, particularly to Amsler, in the light of the confessions and the activities of the other defendants" and "five tape recordings secured from Irwin and used against Amsler" [Amsler's Op. Br. p. 74]. He does not specify which tape recordings and in what particular they were "used" 5/ against Amsler and the only authority he cites for his contention is People v. Aranda which is a California State Court

5/ If appellant Amsler is referring to the tapes of recordings made during Irwin's interview with the F. B. I. on December 13, these were marked for identification during pre-trial hearings on the motions to suppress. They were never "used" in evidence at the trial. See appellee's argument infra relating to the admissibility of Irwin and Amsler's admissions and footnote at p. 67, infra.

decision and is not binding on this court which looks to the Federal Rules of Criminal Procedure and in this instance, Rule 14 thereof.

The grant or denial of a motion for separate trial is discretionary and, in the absence of an affirmative showing of abuse a refusal of severance is not assignable as error. United States v. Carter, 311 F. 2d 934 (6th Cir. 1963), cert. den. 373 U. S. 915, No. 955 reh. den. 373 U. S. 954; Rule 14 Federal Rules of Criminal Procedure. Appellant Amsler here has made no showing of abuse as to refusal of severance.

F. THE TRIAL

1. THE JURY WAS PROPERLY IMPANELED.

Appellant Amsler contends that he was deprived of due process of law in that the manner and method of selecting the jury was not in accordance with the procedures used in the State of California, the state in which the alleged crime was committed but was in accordance with the so-called "Arizona system" not authorized under the procedure in the State of California and that the court erred in not allowing defendants twenty peremptory challenges, "kidnapping being a capital offense" [Amsler opening brief, pp. 26-30]. He cites no authority for these contentions. He objects to the system of simultaneous peremptory challenges which have been employed by Judge East and many other federal judges. He fails

to recognize decisions of the Supreme Court and this court which have sustained the very procedure of impanelment to which he objects. Pointer v. United States, 151 U.S. 396, 412 (1894); Hanson v. United States, 271 F.2d 791 (9th Cir. 1959); Carbo v. United States, 314 F.2d 718 (9th Cir. 1963), cert. den. 377 U.S. 953, reh. den. 377 U.S. 1010 (1964) [R. T. February 10, 1964, pp. 11-13, 99-111].

His contention that the defendants were entitled to twenty challenges rests on his assumption that kidnapping is a capital offense. This might be so were the victim harmed which must be pleaded. This was not the case here and the indictment contains no hint as to any harm to the victim [C. T. 2-5]. United States v. Poitras, 339 F.2d 428 (4th Cir. 1964)(See supra, p. 38).

2. THE TRIAL COURT DID NOT ERR IN LIMITING CROSS-EXAMINATION.

Appellant Amsler asserts that "at the outset of the trial, the court stated that only one counsel would be permitted to cross-examine a witness on a subject matter and that the other counsel could not repeat anything . . . covered by one counsel [Amsler's Op. Br. 76]. It is true that the court asked counsel "not to bring out repetitious matters" [R. T. 13-14] which is clearly within the trial court's discretion in the conduct of the trial.

Kohatsu v. United States, 351 F.2d 898 (9th Cir. 1965);

Beck v. United States, 298 F.2d 622, 629 (9th Cir. 1962);

Enriquez v. United States, 293 F.2d 788, 794 (9th Cir. 1961);

Robles v. United States, 279 F.2d 401, 405 (9th Cir. 1960).

Moreover, the record amply reflects that the trial judge did not restrict counsel as to pertinent cross-examination [R. T. 13-14]. During pretrial, the Court stated:

> "Of course, each defendant will be honored with cross-examination of all Government's witnesses by his own attorney if he wishes, and the only restriction will be that there shall be no repetition of the same subjects." [Vol. IV, R. T. Pretrial, January 31, 1964, p. 507].

The Trial Court was, in fact, extremely liberal in allowing cross-examination by counsel for each defendant [R. T. 30, 43, 81, 89, 90-92, 120, 153, 155, 850, 889, 1206, 1221-1222].

Appellant Amsler's contention that the court erred "in failing to permit cross-examination and confrontation of the money . . . . The defense never having had an opportunity to see or examine the so-called ransom money" is unintelligible [Amsler's Op. Br. pp. 74-75]. What is meant by "cross-examination of the money"? There was no direct examination. Obviously appellant's counsel did not see the ransom money per se but its use as evidence [See R. T. 2171, appellant's sole reference to the record. See also

Vol. II, Motion to Suppress, January 27 and 31, 1964, pp. 161, 164-166]. The motion to suppress the ransom money referred to in the testimony was denied [Vol. IV, Motion to Suppress, January 31, 1964, pp. 492-493]. Appellant does not cite the court to any place in the proceedings below where appellant took any affirmative step to obtain the money. 6/

3. THE EVIDENCE IS SUFFICIENT TO SUSTAIN THE JUDGMENT OF CONVICTION AS TO APPELLANT AMSLER.

The Government's case as to appellant Amsler is abundantly sufficient to sustain the judgment of conviction against him both as to the facts and as a matter of law. 7/

Appellee's Statement of Facts as set forth in this brief extensively details the direct and circumstantial evidence against

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6/ As Government counsel pointed out, once money, which is identified by serial numbers, has been used in a criminal case, the practice is to have such money, through the Treasury Department, removed from circulation, destroyed and replaced with new currency [Vol. IV, R. T. January 31, 1964, p. 163].

7/ Appellant Irwin has not even questioned the sufficiency of the evidence to support his conviction other than his statement that the most damaging evidence against him, the admissibility of which he attacks, were his confession and tape recordings of his telephone calls in connection with the ransom money [Irwin's Brief, pp. 3, 6-7]. This election by Irwin not to attack the sufficiency of the evidence is understandable in light of the overwhelming quantum of evidence set out in appellee's Statement of Facts herein. This position of appellee's argument as to sufficiency of the evidence is addressed to Amsler's specifications of error Numbers IX and XVIII (Amsler's Op. Br. pp. IV, V, 52, 72).

Amsler, his participation in the conspiracy, including at least six of the overt acts in furtherance thereof, the interstate transportation of the kidnap victim, aiding and abetting in the transmission of the kidnap victim, aiding and abetting in the transmission by telephone of the ransom demands, and the receipt and possession of the ransom money, as charged in counts one through six of the indictment [See appellee's Statement of Facts, supra, pp. 15-33].

In light of Amsler's bold assertion that "the court erred in denying the motions for judgments of acquittal" and that "the verdicts are contrary to the law and the evidence [Amsler Op. Br. pp. 72, 52] it is significant to note that Amsler does not question the sufficiency of the evidence as to the conspiracy count, nor as to Amsler's participation in the conspiracy and the numerous overt acts in furtherance thereof, nor does he seriously question the sufficiency of the evidence as to counts three through six. Amsler's argument that there was " . . . no evidence of interstate transportation by Amsler prior to the consent of Frank Sinatra, Jr. to the transportation" is awkwardly bare in the light of the record which he appears to ignore [Amsler's Brief, pp. 49-50. See Appellee's Statement of Facts, supra, pp. 19-21, R. T. 2720-2748, 2759-2760, Exhibit 4, 4A, Exhibit 26 series, particularly 26C, 26E, 26G and 26K, Exhibit 27, Exhibit 59]. In making the above assertion with respect to lack of evidence of interstate transportation, he assumes consent. In arguing consent appellant Amsler points to the victim's "failure to make any outcry" and his "attitude to consent to the trip" [Amsler's Brief, pp. 50, 54]. Appellant

Amsler asserts that "Sinatra, Jr. was enjoying it, it was exciting to him" (no reference to the record is offered which supports such a statement) "he was consenting and going along with it" [Amsler's Brief p. 54]. What the record does reflect is that in answering some of defense counsel's questions, Sinatra, Jr. stated in effect that he "consented" to the acts and conduct of the defendants Keenan and Amsler in taking him from his room and transporting him [See Statement of Facts, supra, p. 20]. However, as the trial judge correctly instructed the jury:

> " . . . one of the special ingredients of the alleged crime of unlawful kidnapping as charged in count No. 2 is the lack of free-will consent on the part of the alleged victim, Frank Sinatra, Jr. to be taken, transported and removed from one state to another for the purpose of ransom. Therefore, when one of the exercise of his own free will and with knowledge of what is taking place with respect to his person voluntarily and willingly consents to accompany another, the latter cannot be guilty of kidnapping the former as long as such condition of free-will consent exists and in this connection you are instructed that a voluntary or free-will consent on the part of any person may be expressly or impliedly be given by him.
>
> "It has been pointed out to you that Frank Sinatra, Jr. in answering some of the defense counsel's questions stated in effect that he consented to the acts

and conduct of the defendants Keenan and Amsler of taking him from his room and transporting him. I point out to you that Frank Sinatra, Jr. also stated that he cooperated or complied with the defendant's request.

"Members of the jury it is for you to interpret these expressions of language and determine therefrom your interpretation of whether Frank Sinatra, Jr. acknowledged or expressed a free-will consent to be taken and transported as revealed in the evidence or he was then acting under some physical or mental restraint.

"You, as trial jurors, may or you may not find a free-will consent to have been quietly given from action as well as in action on the part of Frank Sinatra, Jr. when such action or in action, as the case may be, and as found by you on the part of Frank Sinatra, Jr., is viewed in the light of all of the surrounding facts and circumstances and with reason and common sense.

"If you find from the evidence that one or both of the defendants Keenan and Amsler threatened Frank Sinatra, Jr. at any given time with a pistol or pistols in a menacing manner or made commands or threats therewith, then you as trial jurors, may, if you wish, infer such menacing use or verbal threats of shooting,

pistol or pistols, if any, that the pistol or pistols were loaded with bullets and being then capable of causing bodily harm and I would comment that you could infer, if you wish, that Frank Sinatra, Jr. so inferred and acted accordingly." [18 R. T. pp. 4245-4247].

What were some of the surrounding circumstances and evidence from which the jury found lack of free-will consent by the victim? Or in appellant's words, why did the victim cooperate and fail "to make any outcry". The victim, nineteen years old, was seized at gunpoint [R. T. 527-528] at night. He saw the gun, he was placed in a car, not fully dressed and driving in blizzard weather was told by Amsler and Keenan that they were parolees "risking a jail sentence for twenty bucks" and that he was being taken as a hostage so that they could make their getaway and that they were going to release him [R. T. 544, 548, 3355, 4076-4077. See appellee's Statement of Facts, supra, pp. 19-20]. Appellant Amsler blandly asserts that Sinatra, Jr. "had consented to the trip" and that such consent "vitiates" any kidnapping [Amsler's Op. Br. p. 50]. The uncontradicted evidence was that Sinatra, Jr. was not told anything about being the victim of a kidnapping until they reached the hideout house at Mason Avenue in Canoga Park [R. T. 4076-4077; R. T. 574]. Appellant Amsler ignores the uncontradicted evidence that young Sinatra was fearful that his life was in jeopardy had he failed to follow directions [R. T. 633, 647-

648, 939]. Just before the roadblock the victim did not know that Keenan had thrown away his gun. Amsler had kept his gun [See Statement of Facts, supra, p. 20]. As far as the victim knew they were armed [R. T. 635]. Turning to the roadblock, at about the time Amsler panicked and left the car and hid in a snowbank and Keenan removed his tire chains, appellant Amsler asserts that Frank Sinatra, Jr. was "sitting there all alone in the back seat watching all of this performance" [Amsler's Brief, p. 53]. This is not the evidence in that after they got out of the car the victim could not see them. He could only hear voices [R. T. 551, 4076]. How did the victim know that Amsler and Keenan were not still armed [R. T. 2742. See also Government prosecutor's argument, R. T. 4076-4077]?

On appeal, when considering an attack upon the sufficiency of the evidence, the appellate court must view the evidence at trial in the light most favorable to the Government, together with all reasonable inferences which may be drawn therefrom. Noto v. United States, 367 U.S. 290 (1961); Glasser v. United States, 315 U.S. 60 (1942); Stein v. United States, 337 F.2d 14 (9th Cir. 1964); Byrnes v. United States, 327 F.2d 825 (9th Cir. 1964), cert. den. 377 U.S. 970. If the court then finds substantial evidence, it must presume the findings of the trier of fact to be correct and the judgment must be sustained. Noto v. United States, supra; Ingram v. United States, 360 U.S. 672, 678 (1959); Kotteakos v. United States, 328 U.S. 750, 763-764 (1946); Glasser v. United States, supra.

The credibility of witnesses and the weight to be given their testimony is a matter within the province of the trial court which has seen and heard the witnesses. Stoppelli v. United States, 183 F. 2d 391 (9th Cir. 1950), cert. den. 340 U.S. 864.

Appellee submits that the evidence presented at the trial and as further reflected in the Statement of Facts clearly was amply sufficient to sustain the jury's verdict of guilty as to appellant Amsler, as to all counts of the indictment.

4. THE COURT BELOW DID NOT ERR IN THE ADMISSION AND EXCLUSION OF EVIDENCE.

(a) As to the witness Bray, appellant Amsler contends [Amsler's Op. Br. p. 60] that the court erred in "refusing to allow Bray to answer this question:

> "Q. Isn't it a fact that he (Keenan) told you that you could not be prosecuted because Mr. Frank Sinatra, Jr. was cooperating?" [R. T. 61].

As Government counsel and the court observed, the witness had, in response to a previous question as to whether Keenan had told him that Frank Sinatra, Jr. would cooperate, answered in the negative [R. T. 2114]. The witness reiterated a negative reply [R. T. 2118]. As to the question quoted as having been put to Bray, appellant has miscited the record [Amsler's Op. Br. p. 60]. In any event, the question was obviously objectionable as to form.

As to the witness' answer, "I hope I am not linked with this", again the record is miscited although the answer would appear to be partially responsive.

(b) TAPE RECORDINGS OF TELEPHONE CALLS MADE BY APPELLANT IRWIN WERE NOT IN VIOLATION OF THE FEDERAL COMMUNICATIONS ACT AND WERE ADMISSIBLE.

Appellant Irwin states that the F. B. I. overheard on an extension telephone and recorded nine telephone calls made by Irwin to Frank Sinatra, Sr. in Reno and Carson City, Nevada and Los Angeles [Irwin's Op. Br. p. 27]. This is incorrect. There were no tape recordings of Irwin's calls to Ron's Service Station or Oxoby's Station in Carson City nor of the call to the Standard Station at Camden and Santa Monica [See appellee's Statement of Facts, pp. 22-24, supra; R. T. 4083-4085 and Appendix C hereto].

Irwin concedes that he made the calls [Irwin's Op. Br. p. 28, R. T. 3586-3587]. He does not question that Frank Sinatra, Sr. had consented to the recording by the F. B. I. of any calls he received [Irwin's Op. Br. pp. 28-32; R. T. 1319, 1330]. Although appellant Irwin questions Frank Sinatra, Sr.'s credibility as to his ability to recollect the content of the calls, Sinatra, Sr.'s testimony was clear and uncontradicted [R. T. 1330-1350]. Appellant Irwin ignores the fact that Frank Sinatra, Sr. made handwritten notes contemporaneously with the calls [Ex. 47, Ex. 48, R. T. 1332,

1336]. He also completely disregards the testimony of the F. B. I. agent and his notes as to the calls to which no objection was made [R. T. 1500, 1502, 1503, 1504, 1506, 1507, 1511]. It is clear, even disregarding the tape recordings, that there was sufficient evidence to sustain the verdict and judgment of conviction as to Counts Three, Four and Five [See Appellee's Statement of Facts, supra, pp. 21-27]. Moreover, Irwin's contention that the admission into evidence of the tape recordings violated the Federal Communications Act in that " . . . Irwin did not consent to the interception or publication of the contents thereof . . ." [Irwin's Op. Br. p. 29] is not supported by law. In Rathbun v. United States, 355 U. S. 107 (1957) the Supreme Court construed Section 605 sensibly in resolving the question presented here:

> " . . . The clear inference is that one entitled to receive the communication may use it for his own benefit or have another use it for him. The communication itself is not privileged, and one party may not force the other to secrecy merely by using a telephone. It has been conceded by those who believe the conduct here violates Section 605 that either party may record the conversation and publish it. . . ." Rathbun v. United States, supra, at p. 110.

Appellant Irwin argues that " . . . There is nothing in Rathbun to indicate that electrical recordings of conversations are not violations of the statute irrespective of the consent of one party

to such recording" [Irwin's Op. Br. p. 29]. The precise question raised here was settled in the Fifth Circuit against the appellant in a decision which analyzed the entire history of cases under Section 605 in determining whether an "interception" occurred within the meaning of the statute when a party to the conversation recorded a call without obtaining the permission of the other party:

> " . . . Taking a sensible view of it, the only difference between a person testifying to a conversation which he participated in or overheard and a recording of the conversation is that the recording has the advantage of furnishing trustworthy evidence (Assuming a showing that the tape has not been tampered with)."

Carnes v. United States, 295 F. 2d 598 (5th Cir. 1962), cert. den. 369 U. S. 861;

People v. Malotte, 46 Cal. 2d 59, 292 P. 2d 517 (1956) (per Traynor, J.).

This court has, on the several recent occasions when the question was raised, held squarely that Section 605 inapplicable in these circumstances.

Battaglia v. United States, 349 F. 2d 556 (9th Cir. 1965);

Lindsey v. United States, 332 F. 2d 688 (9th Cir. 1964);

Carbo v. United States, 314 F. 2d 718 (9th Cir. 1963), cert. den. 377 U. S. 953, reh. den. 377 U. S. 1010 (1964).

(c) ADMISSIONS BY APPELLANTS IRWIN AND AMSLER WERE LAWFULLY OBTAINED AND PROPERLY ADMITTED BY THE TRIAL COURT.

1) Appellant Irwin's Admissions.

Appellant Irwin contends that Irwin's "confession was unlawfully extracted and coerced during a period of unlawful detention in violation of procedural due process and the right to counsel and the confession should not have been admitted into evidence" [appellant Irwin's Op. Br. p. 8, Ex. 61]. He divides his argument into two branches: (a) that Irwin's confession was obtained during a period of unlawful detention in violation of Rule 5(a) Federal Rules of Criminal Procedure and (b) that the confession was "coerced in violation of appellant's right to due process of law and his right to counsel" [Irwin's Op. Br. pp. 6-26].

While not attacking the "voluntariness" of Irwin's confession appellant Amsler challenges its admissibility under Rule 5(a) and the Fifth Amendment. In this connection it should be noted that Irwin's admissions were offered and admitted against Irwin alone [Amsler Op. Br. pp. 45-47, R. T. 2464].

At the outset it should be observed that neither appellant makes any helpful reference to the voluminous pre-trial record and the extensive testimony heard in connection with the motions to suppress which encompassed some four volumes of transcript nor to the trial judge's illuminating comments at the time he denied the

motion [C. T. 16, 254 Vols. I-IV, inclusive, January 27 to 31, 1964, pp. 490-494]. Indeed appellant Irwin nowhere in his brief even mentions the proceedings in connection with the Motion to Suppress. Secondly, the term "confession", which both appellants employ, was in fact never used in the trial court by Government counsel or the trial court [see Judge East's comments at p. 493, Vol. IV pre-trial, R. T. January 31, 1964]. This becomes important in that we are not dealing here simply with a single "confession" but rather with a series of seven "confessions" made by Irwin at various times. In attacking only the seventh confession which was last in point of time, Irwin glosses over the first five confessions [See appellee's brief, pp. 57-58 infra]. 8/

Since the surrounding factual circumstances are of critical importance in evaluating appellant's contentions, it is essential at the outset to direct this court's attention to certain misstatements of fact or misleading statements which appear in appellants' opening briefs. As is more fully reflected in appellee's Statement of Facts concerning Irwin's admissions, the following are among the more flagrant assertions which are either untrue, unsupported or

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8/ As to when, during Irwin's detention, he was "arrested" was not determined by the trial court. The prosecutor acknowledged that he was under arrest "sometime during the day of the 13th" [Vol. IV, R. T. Motion to Suppress, p. 484]. Until such time as the serial numbers of the ransom bills taken from Irwin had, together with other leads, been checked out and until the F. B. I. knew it had jurisdiction (see infra p. 62) it may be argued that state law would apply. Under California law mere detention for questioning is not considered an arrest. People v. King, 175 Cal. App. 2d 386, 390 P. 2d 235 (1959); People v. Anguiramo, 198 Cal. App. 2d 426, 429, 18 Cal. Rptr. 132 (1961); 39 Cal. L. Rev. 99.

misleading; that the confession was "extracted by F. B. I. interrogators"; that "the F. B. I. embarked upon a thirteen hour period of continuous interrogation . . . beginning at 9:50 a. m. and continuing without interruption except for meals and toilet relief until 10:30 p. m. that night"; that "at the end of thirteen continuous hours of questioning on December 13, appellant still was not taken before a Commissioner"; that "after his appearance, appellant was still not able to sleep during the remainder of the morning, primarily because there was no bed in the room to which he was taken"; that " . . . there is nothing in the record to indicate any explanation by the Federal authorities for their failure to take appellant before a Commissioner who was presumably available in the same building in San Diego which houses the F. B. I. office"; that a United States Commissioner " . . . with certainty was readily available to agents Mitchell and Moore at 9:00 a. m. on Friday morning when appellant was taken into custody"; that " . . . clearly all admissions that followed arrival at the F. B. I. office resulted from differing degrees of inducement, and were hence not spontaneous"; that appellant's statement " . . . was also the result, not of free choice but of overbearing suggestion and pressure from the F. B. I. during a time when appellant was physically exhausted and when appellant requested, and was refused an attorney"; that "appellant requested that he be entitled to the assistance of counsel to review the written statement before he signed the same and that the F. B. I. refused such request and continued to pressure appellant to sign the confession" [appellant Irwin's Op. Br. pp. 6, 8-26] that "five tapes of

recordings were taken from Irwin outside of the presence of Amsler . . . and were later introduced in evidence at the trial of this case"; and that the statements of Keenan were introduced in evidence against Amsler. Neither statement is true [R. T. 2614, Vol. I, R. T. Motion to Suppress, p. 142; Amsler's Op. Br. pp. 46-48, emphasis added]. It is respectfully suggested that without reference to appellee's Statement of Facts this Court would be misled by the foregoing representations of appellants' counsel [See appellee's Statement of Facts, pp. 26-33, supra].

a) The "McNabb-Mallory" Rule is Inapplicable to Irwin's Confessions Which Were Properly Admitted by the Trial Court.

Appellant Irwin, in attacking the admissibility of Irwin's written confession fails to consider the legal effect of at least five earlier confessions. This is evident in his argument that " . . . even if appellant had made separate confessions, one on Friday and the other confessions after examination by the Commissioner, the second confession was the product of the first . . ." [Irwin's Op. Br. p. 14, emphasis added]. This is understandable as appellant seeks to establish that the post-arraignment confession was the product of an unlawful period of detention in violation of Rule 5(a) Federal Rules of Criminal Procedure which clearly was not true in this case. In point of time there were at least five confessions or series of admissions made by Irwin before he could be

considered to be under "arrest": (1) to his brother before the F. B. I. was called; (2) over the telephone to the F. B. I. before F. B. I. agents arrived; (3) to his brother and F. B. I. agents outside the Irwin house; (4) to the F. B. I. agents after Irwin volunteered to accompany them to the F. B. I. office and during the ride; (5) in the garage area of the F. B. I. building at the time Irwin consented to be searched [R. T. 2289-2297, 24-6-2418, 3677-3686, see appellee's Statement of Facts "Irwin's Admissions" at pp. 26-32, supra]. These were all spontaneous or voluntary pre-arrest admissions. It was during this time of Irwin's volunteered statements to his brother and the F. B. I. that Irwin let the 'cat out of the bag' [See Irwin's Op. Br. p. 14]. Even assuming arguendo there was any period of unlawful detention after Irwin was arrested sometime following his arrival at the F. B. I. offices, and assuming further that a delay in arraignment was not unavoidable or justified by the circumstances of the case, it is inconsequential since the confessions " . . . preceded the delay and thus could not have been its fruit". United States v. Gorman, 355 F. 2d 151, 155-157 (2nd Cir. 1965); United States v. Mitchell, 322 U. S. 65, 70-71 (1944).

As to the 27-page statement [Ex. 61] to which Irwin's brief is addressed, this was simply a voluntary re-affirmation of Irwin's pre-arrest "threshold" admissions. The statement was read, corrected and signed by Irwin after arraignment and not during any period of improper detention, assuming there was such a period. [See appellee's Statement of Facts, "Irwin's admissions" pp. 26-32, supra; R. T. 2453-2459, 3674-3675]. The question is thus one of

voluntariness. Feguer v. United States, 302 F. 2d 214, 251-252 (8th Cir. 1962); United States v. Mitchell, 322 U. S. 65 (1944); Jackson v. United States, 285 F. 2d 675, 679 (D. C. Cir. 1960), cert. den. 366 U. S. 941 (1961). The trial judge meticulously followed the procedure prescribed by United States v. Carnigan, 342 U. S. 36, 38 (1951) [Vols. I-IV, January 27-31, 1964, pp. 490-494, R. T. 4011].

There could be no clearer case than that of appellant Irwin as to his voluntary submission to questioning. United States v. Vita, 294 F. 2d 524 (2nd Cir. 1961). Here was a man whose sole desire was to "make a clear breast of it", who wanted to turn himself in and "be through with it", whose wish was to "straighten out his relationship to the Sinatra case" and who told his wife and testified at the trial that he was "surrendering voluntarily" [R. T. 3678. Appellee's Statement of Facts, "Irwin's Admissions" p. 26, supra]. It should also be noted that none of the admissions or confessions of Irwin which were admitted into evidence against Irwin were made by Irwin between the time of his arrest and arraignment. The five tapes taken by the F. B. I. during the interview on December 13 were never offered in evidence [R. T. 2614, 2394, Vol. I Motion to Suppress, p. 142]. In light of the foregoing, appellant Irwin's argument under Rule 5(a) is essentially irrelevant.

Even if we were to assume arguendo that any of Irwin's admissions received in evidence were not voluntary and were the product of the period between arrest and arraignment, the delay was not "unnecessary" within the meaning of Rule 5(a) and was

justified by the circumstances of this case. The Supreme Court recognizes in Mallory that " . . . the duty enjoined upon arresting officers to arraign 'without unnecessary delay' indicates that the command does not call for mechanical or automatic obedience . . ." citing as such a "circumstance" the situation where a story volunteered by the accused is susceptible of verification through third parties. Mallory v. United States, 354 U.S. 449, 451-452, 1 L. ed. 2d 1479 (1957).

In United States v. Vita, 294 F. 2d 524 (2nd Cir. 1961), the court in considering the application of Rule 5(a), stated at page 532:

> "We believe that there are also circumstances which may warrant a detention that is more than 'brief'; but when needed for investigation rather than merely repetitious interrogation, reasonable detention is permissible so long as certain safeguards are observed."

There is no indication in the record that appellant Irwin's detention was used to subject him to repetitious interrogation or that his admissions were other than voluntarily made [See appellee's Statement of Facts, supra, p. 26].

Where a defendant objects to the admissibility of a 'confession' on grounds that it was obtained during a period of illegal detention, it is usually the defendant's burden to show a violation of Rule 5(a). United States v. Walker, 176 F. 2d 564 (2nd Cir. 1949), cert. den. 342 U.S. 868 (1951). Since it is arguable that, as to Irwin, there was a 'detention' without an 'arrest' the Government shoulders the burden of explaining the reasonableness of such delay.

United States v. Vita, supra, at p. 534. This must be judged in the light of all the attendant circumstances.

The court in Vita detailed the criteria upon which the detention was reasonable:

> "We believe that when a continuing process of essential investigation is being carried out expeditiously, when the suspect is advised of his constitutional rights, and when there is no reason to believe that the procedures being followed are used merely as an excuse for delay during which a confession can be extracted, detention is not 'arrest' and in any event is not unnecessary, and an uncoerced confession so obtained is admissible."
>
> United States v. Vita, supra, at p. 534.

As Chief Judge Lombard said in the recent case of United States v. Cone, 354 F.2d 119, 126 (2nd Cir. 1965):

> "The fact is that in many serious crimes - . . . murder, kidnapping . . . the police often have no or few objective clues with which to start an investigation. A considerable percentage of those which are solved are solved . . . through statements voluntarily made to the police by those who are suspects. Moreover, immediate questioning is often instrumental in recovering kidnapped persons or stolen goods as well as solving the crime. . . ."

The case at bar was a major kidnapping case of great notoriety in which the law enforcement officers' concern was not merely the apprehension of one, but three suspects and the recovery of almost $240,000 ransom money. Their trial involved an area from Stateline California through Nevada to Canoga Park, California. On December 13 when the F. B. I. agents responded to the telephone call from Irwin's brother's house, the San Diego call was hundreds of miles removed from the place of the kidnapping. At the time Irwin showed them to the attache case "filled with currency", almost $200,000 of the ransom money had not been located. The serial numbers on all the bills found in Irwin's car had to be checked out with the F. B. I. in Los Angeles. Moreover, time was required to check out numerous 'leads' which had been received including those from Irwin, a person of unknown reliability. The gun which Keenan had thrown away was not found until the next day [R. T. 1462-1464]. Appellant Irwin glosses over this period of essential and time-consuming investigation which led to the apprehension of Keenan and Amsler and recovery of practically the entire ransom payment.

In the recent case of United States v. Gorman, 355 F. 2d 151, 155-157 (2nd Cir. 1965), the court stated that the agent was " . . . bound to inquire as to the facts in order to ascertain what other persons might be involved and where they and the stolen money might be found".

What difference did it make at that time whether

Commissioner Graydon was at her office or not? 9/ Agent Callister, explaining why Irwin was not arraigned earlier, testified as follows: ". . . during this period, Mr. Irwin had voluntarily accompanied us to our office, as he said, to straighten out his association with the Sinatra case. We were interviewing him, and at this time we were trying to get information from him which might assist us in locating the other two individuals who were involved . . . it was not until process had been filed in Los Angeles that I was able to make arrangements for the arraignment. And so when I was informed that process had been filed in Los Angeles, I immediately made arrangements to arraign him in San Diego . . ." [R. T. January 27, 1964, pp. 108-109].

This was a Friday. The Commissioner's office and courts close at 5:00 p. m. This Court has held that delay occasioned by the unavailability of a Commissioner when the arrest occurs after the beginning of a weekend is reasonable. Williams v. United States, 273 F. 2d 781, 792, 798 (9th Cir. 1959), cert. den. 362 U. S. 951 (1960). Agent Callister received word from Los Angeles shortly before 3:00 a. m. on December 14 that arrangements were being made to 'file process'. He immediately arranged to have the U. S. Commissioner come to her office from her home and Irwin was arraigned at 3:00 a. m. [R. T. January 27, 1964, pp. 106-109]. Compare Bailey v. United States, 328 F. 2d 542 (D. C. Cir. 1964);

9/ Appellant Irwin misstates the facts in repeatedly representing that the U. S. Commissioner was available "with certainty" to the F. B. I. in the same building [Irwin's Op. Br. pp. 13, 17, 20, 24. See Vol. I, pre-trial, pp. 72, 73, 77, 105].

United States v. Mitchell, 322 U.S. 65 (1944).

Appellant Irwin relies on Morales and Ginoza, decided by this Court [appellant Irwin's Op. Br. pp. 13-24]. The facts in the instant case are clearly distinguishable. Appellant Irwin concedes that in Ginoza the facts were different and unlike this case. In Ginoza, there were no spontaneous admissions. Ginoza, until confronted by an informer after a period of "intensive interrogation" made no admissions [appellant Irwin's Op. Br. pp. 22-23]. Another basic difference is that in Ginoza there was no 'volunteered story', no leads to be checked out through other law enforcement officers or third parties. See United States v. Hall, 348 F.2d 837 (2nd Cir. 1965); United States v. Gorman, 355 F.2d 151, 155-157 (2nd Cir. 1965). Also, in Ginoza any possible doubt as to the availability of a Commissioner was precluded by the fact that an hour before Ginoza was booked it took officers only twenty minutes to find a Commissioner who executed a search warrant at 5:30 p.m. to search Ginoza's place of business. He was booked at 6:30 p.m. but was not arraigned until the following day.

Morales is also clearly distinguishable. Once the officers were inside Morales' house and were told he was using narcotics and shown his punctured and marked arms, it then became their duty to arrest him. Further, in Morales, a period of 14 hours in state custody was considered by the court as to reasonableness of delay [See Muldrow v. United States, 281 F.2d 903 (1960)]. Morales was then interrogated by Federal officers in the same building as the U. S. Commissioner's office. Morales is further to be

distinguished in that he was told by agents that any cooperation he gave to the Government would be reported to the United States Attorney. Moreover, unlike Morales and Ginoza, appellant Irwin made (1) spontaneous admissions to his brother even before the F. B. I. arrived and to the F. B. I. before he agreed to accompany them to the F. B. I. offices; (2) he waived counsel after repeatedly being informed of his rights (Statement of Facts, supra, p. 28) and (3) he reaffirmed his threshold admissions by executing his 27-page statement after arraignment. Jackson v. United States, 285 F. 2d 675, 679 (D. C. Cir. 1960), cert. den. 366 U. S. 941 (1961); Mitchell v. United States, 322 U. S. 65, 69 (1944); Feguer v. United States, 302 F. 2d 214, 250-252 (8th Cir. 1962).

Furthermore, in Morales and Ginoza there was nothing in the record to indicate any explanation for the delay [appellant Irwin's Op. Br. pp. 17, 21]. This, of course, is not the case here [Vol. I, pre-trial R.T. January 27, 1964, pp. 108-109]. Rather, appellant Irwin's detention was for essential investigation expeditiously carried out, not for merely repetitious interrogation. Vita, supra, 532, 534; Hall v. United States, 348 F. 2d 837 (2nd Cir. 1965); United States v. Gorman, 355 F. 2d 151, 155-157 (2nd Cir. 1965).

2) Appellant Amsler's Admissions

As to appellant Amsler, the chronology of events, as

reflected by the record, between his arrest on Friday midnight and arraignment at 3:32 a.m., is the sufficient answer to appellant's attack on admissibility of Amsler's statement [Ex. 59; see appellee's Statement of Facts re appellant Amsler's admissions at pp. 30-32, supra]. Counsel for Amsler states that Amsler "denied that the confession and the interviews were free and voluntary" [Amsler's Op. Br. p. 48]. The record is to the contrary [R. T. 3174-3175, see opening paragraph Ex. 59]. In fact, Amsler's attorney after the F. B. I. interview was completed and the statement signed told Amsler to continue to cooperate with the F. B. I. [R. T. 2751, 2756].

3) Appellants Irwin and Amsler Fail to Make Any Showing That Their Statements Were Coerced.

Following an extended hearing on the Motions to Suppress and exhaustive testimony of numerous witnesses thoroughly cross-examined at which the prosecution offered proof, the trial court preliminarily ruled that the statements were not illegally taken from appellants 10/ [Vol. IV Motion to Suppress January 31, 1964 pp. 493-494]. The discretion in the trial court will not be disturbed on appeal in the absence of a clear abuse. Ortiz v. United States, 318 F. 2d 450 (9th Cir. 1963), cert. den. 376 U. S. 953. Clearly,

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10/ The motion to suppress Keenan's statement was also denied. It was not offered against appellants Irwin or Amsler. Keenan is not an appellant having dismissed his appeal [R. T. 2394, 2614].

the appellants have made no such showing here.

4) Appellants Both Rely Upon Escobedo v. Illinois, 378 U.S. 478 (1964) and Massiah v. United States, 377 U.S. 201 (1964) Arguing That No Attorney for Appellants Was Present at the Time the Admissions Were Made. 11/

In Escobedo the admissions were made while the defendant was under arrest and although his attorney was in an adjoining room of the police station, each was affirmatively denied access to the other. In Massiah, the statements were obtained secretly during the accusatory stage of the proceedings after the defendant had been indicted and in the absence of and without notice to his retained attorney.

Here, on the other hand, neither Irwin nor Amsler had retained an attorney. Both had been effectively and repeatedly informed of their right to counsel, that whatever statement they made might be used against them, and of their right to remain silent [Statement of Facts, supra, pp. 26-32]. In Escobedo, the

11/ Counsel for appellant Amsler refers to five tapes of recordings "taken from Irwin" and "introduced in evidence in the trial of this case". This is untrue as Amsler's own reference to the record reflects [appellant Amsler Op. Br. pp. 47, 74, Vol. I, pre-trial R. T. 142]. These tapes were marked for identification at the pre-trial hearing on the Motion to Suppress. They were never used in evidence at the trial [see appellant Amsler's List of Exhibits]. He also misstates the record that Keenan's statements were "introduced" against Amsler [Amsler's Op. Br. p. 48; R. T. 2614].

court noted that this was a "critical circumstance" which could be waived [Escobedo, supra, at pp. 491-492, f. n. 14]. If suspect is told of the right to consult counsel and makes no request or attempt to exercise that right before making incriminating statements, the resulting statements are admissible in evidence. United States v. Drummond, 354 F. 2d 132 (2nd Cir. 1965), cert. pending No. 1203 miscellaneous, this term; Davidson v. United States, 349 F. 2d 530, 534 (10th Cir. 1965); Hayes v. United States, 347 F. 2d 668 (8th Cir. 1965); Payne v. United States, 340 F. 2d 748 (9th Cir. 1965); Otney v. United States, 340 F. 2d 696, 702 (10th Cir. 1965); Jackson v. United States, 337 F. 2d 136, 139-141 (CA D. C. 1964), cert. den. 380 U. S. 935 (1965); see Pennsylvania v. Maroney, 348 F. 2d 22, 31-32 (3rd Cir. 1965). As to the period before arraignment the evidence is clear. Irwin had specifically declined to consult an attorney and had waived these rights [R. T. Vol. I, Motion to Suppress, pp. 57, 103, appellee's Statement of Facts, supra, pp. 26-32]. Although Irwin testified that at the time of signing the 27-page statement, "I told them I wanted a lawyer" and "They wouldn't let me have a lawyer", the F. B. I. log of activities at the jail on that date and F. B. I. agent Field's testimony are explicitly to the contrary [R. T. 3924, Ex. 90]. Notwithstanding Irwin's testimony as to his innocence, the jury found him guilty and the trial judge, at the time of sentencing, stated that he was satisfied that Irwin had testified falsely and had "participated in that testimony knowingly and wilfully" [R. T. April 6, 1965, pp.

50-52]. [12] As to Amsler, even after he had retained counsel, his counsel told him to continue to cooperate with the F.B.I. [R. T. 2751, 2756, Vol. II. Motion to Suppress, pp. 232-257. Appellee's Statement of Facts, supra, p. 32].

5. THE TRIAL COURT DID NOT ERR IN GRANTING A MOTION TO QUASH THE SUBPOENA ISSUED TO FRANK SINATRA, SR. AND IN REFUSING TO SUBPOENA JOHN HANSON UNDER RULE 17(b).

Appellant Amsler contends that the trial court's suppression of the subpoena issued to Sinatra, Sr. was a denial of ". . . the right of confrontation guaranteed by the Sixth Amendment . . ." of an "abuse of process" [Amsler's Op. Br. 37-43]. The record is the sufficient answer. Sinatra, Sr. called as a witness for the Government testified that none of the events related to the kidnapping were part of a publicity stunt or hoax of any kind [R. T. 1358-

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12/ Judge East referred the matter of the false testimony of appellants Irwin and Amsler to the Federal Grand Jury for the Southern District of California [R. T. April 6, 1964, p. 53]. In July, 1964, the Grand Jury returned a three-count indictment against Irwin's trial counsel Gladys Towles Root, Amsler's counsel George E. Forde and Keenan, Irwin and Amsler as unindicted co-conspirators charging violations of 18 U.S.C. §371 and 18 U.S.C. §1503. The court dismissed this indictment. The matter was thereafter presented to another Federal Grand Jury and in December, 1964, a five-count indictment was returned against the same parties and dealing with the same subject matter, charging a conspiracy to suborn perjury, commit perjury and obstruct justice, suborning the perjury of Amsler and Irwin and obstructing justice. This indictment was dismissed by the District Court on June 30, 1965 and the Government took an appeal which is now pending in this court.

1361]. He was cross-examined by counsel for Amsler and Irwin in these areas [R. T. 1361-1407] who indicated at the close of their examination that they had no further questions [R. T. 1375, 1400].

The defense thereafter did not seek to reopen cross-examination but sought and obtained a subpoena under Rule 17(b) [R. T. 1741-1744, 1832-1834; C. T. 100-103]. Thereafter Frank Sinatra, Jr. was called as a defense witness and no new areas were covered by defense counsel's examination [R. T. 634-938, 2937-56, 2975].

The trial court observed that the court had been called on to make a "totally unwarranted use of the process of this court" in recalling the witness Sinatra, Sr. The trial court asked defense counsel for an offer of proof with respect to Sinatra, Sr. which defense counsel objected to and on motion of the witness Sinatra, Sr.'s counsel the motion to quash was granted [R. T. 2975-2984].

We will also deal here with Amsler's contention that the court erred in refusing Amsler a Rule 17(b) subpoena as to the witness John Hanson [Amsler's Op. Br. p. 59].

As to Amsler's affidavit in connection with the Rule 17(b) subpoena [C. T. 112-113] the court correctly pointed out that Amsler would testify in his own behalf under the showing made, and for him then to have a witness testify "as to extra-judicial statements seems to me to be merely the proof of the self-serving statements" [R. T. 2868]. Following Government counsel's suggestion the court did not rule on the application at that time [R. T. 2868-2870]. Thereafter, Amsler took the stand and testified at length in the area covered by the affidavit [C. T. 112-113; R. T.

2993-3037]. The court sustained the Government's objection as to the conversation which Amsler related he had with Hanson as to what Keenan had told Amsler [R. T. 3007]. The court accordingly denied Amsler's request for a subpoena for the witness Hanson [R. T. 3038]. The court had previously been furnished by the Government F. B. I. report of an interview with Hanson, a copy of which was delivered to the defense [R. T. 3038; C. T. 5, Ex. 11]. As it happened subsequently the Government called Hanson as a rebuttal witness [R. T. 3935-3952]. The Government prosecutor on direct examination, examined on the witnesses' knowledge of the matters suggested by the affidavit filed by Amsler's counsel [C. T. 112-113; R. T. 3937-3940]. The perfunctory cross-examination of Amsler's counsel is difficult to square with the representations on his affidavit [R. T. 3942-3952; C. T. 113].

As to the court's disposition of both subpoenas, it can hardly be said that Amsler did not have "the right of confrontation of the witness" [Amsler's Op. Br. p. 39] or that he could "not . . . safely go to trial without the witness . . ." [Rule 17(b), Federal Rules of Criminal Procedure].

These are both clear instances within the discretion of the District Court relating to requests of an indigent defendant under Rule 17(b) to prevent the abuses often attempted by a defendant. Reistroffer v. United States (C. A. Iowa, 1958), 258 F. 2d 379, 3 L. ed. 301, reh. den. 358 U. S. 927. The reviewing court will not disturb the trial court's exercise of discretion unless exceptional circumstances compel it. United States v. Zuideveld, 316 F. 2d 873

(7th Cir. 1963), cert. den. 376 U.S. 916. In the case at bar, the only circumstance which appears to be exceptional is that, although the defense advanced at the trial was that the kidnapping was a pre-arranged publicity stunt or hoax which the victim knew about before it occurred [Amsler's Op. Br. pp. 33, 39; R. T. 16, 21, 24, 28, 29, 4280-4281], there was not one iota of direct evidence to this effect - only defense counsel's statements [R. T. 4244-4245]. 13/

6. THERE WAS NO DENIAL OF APPELLANT'S RIGHT TO A PUBLIC TRIAL BY REASON OF AN ORDER EXCLUDING PHOTOGRAPHERS AND TELEVISION CAMERAMEN FROM THE COURTROOM AND ADJACENT CORRIDORS OF THE SECOND FLOOR.

Appellant Amsler contends that he was denied his constitutional right to a public trial because the district court "excluded all the television people and cameramen from the second floor of the Federal Building, where the trial was being held" [Amsler's Op. Br. p. 43]. Of course, appellant has misstated the facts. The order entered by the district judge did not preclude access to the courtroom or the corridors adjacent thereto of television people and cameramen as appellant contends. It was not cameramen and photographers who were precluded from the courtroom and adjacent

13/ At the conclusion of the trial, Judge East submitted to the Grand Jury the matter of the false testimony of the defendants, Irwin and Amsler [R. T. April 6, 1964, p. 53]. See footnote 12 at page 69, infra.

corridors, but rather "all forms, means and manner of taking photographs, or broadcasting or televising on or from the entire second floor or any part thereof . . ." [See order of the United States District Judges for the Southern District of California entered January 20, 1964, Appendix "A"].

The order entered by Judge East was based upon the order of January 20, 1964 entered by a majority of the judges of this court. That order was in part based upon Canon 35 of the Judicial Canons of the American Bar Association which provides:

> "Proceedings in court should be conducted with fitting dignity and decorum. The taking of photographs in the courtroom, during sessions of the court or recess between sessions, and the broadcasting or televising of court proceedings detract from the essential dignity of the proceedings, distract participants and witnesses in giving testimony, and create misconceptions with respect thereto in the mind of the public and should not be permitted."

The order of the district judges is further based upon a unanimous condemnation of televised trials by the Judicial Conference of the United States. It was there:

> "RESOLVED, That the Judicial Conference of the United States condemns the taking of photographs in the courtroom or its environs in connection with any judicial proceeding, and the broadcasting of

judicial proceedings by radio, television, or other means, and considers such practices to be inconsistent with fair judicial procedure and that they ought not to be permitted in any federal court."

A further basis for the order is Rule 53 of the Federal Rules of Criminal Procedure which prohibits the "broadcasting of trials". Rule 53 provides:

> "The taking of photographs in the courtroom during the progress of judicial proceedings or radio broadcasting of judicial proceedings from the courtroom shall not be permitted by the court."

It is interesting to note that the Supreme Court of California, although not specifically adopting Canon 35, has assumed it was "improper to televise criminal proceedings". See People v. Stroble, 36 Cal. 2d 615, 226 P. 2d 330 (1951), affirmed 343 U.S. 181, reh. den. 343 U.S. 952 (1952); see the Rule adopted by the Conference of California Judges, 24 Cal. State Bar J 299 (1949).

Had counsel for appellant Amsler prevailed in the trial court in his effort to permit the televising and broadcasting of this trial of great notoriety, the very same conditions might have then existed which led the U. S. Supreme Court to reverse in Estes v. Texas, 381 U.S. 532, 14 L. ed. 2d 543 (1965). In Estes, the Supreme Court held that televising and broadcasting Estes' trial deprived Estes of his right to due process under the Fourteenth

Amendment. As the court states:

> "The federal courts prohibit it by specific rule. This is weighty evidence that our concepts of a fair trial do not tolerate such an indulgence. We have always held that the atmosphere essential to the preservation of a fair trial - the most fundamental of all freedoms - must be maintained at all costs. . . ."
>
> Estes v. Texas, supra, p. 549.

Appellant Amsler relies on Matter of Oliver, 333 U.S. 257, which as appellant points out, dealt with secret trials as a denial of the right of "Public Trial" under the Sixth Amendment [Amsler's Op. Br. p. 44]. As Chief Justice Warren observed in his concurring opinion in Estes:

> "Nothing in this opinion is inconsistent with the constitutional guarantees of a public trial. . . . But the guarantee of a public trial confers no special benefit on the press, the radio industry or the television industry . . . and the concept of public trial cannot be used to defend conditions which prevent the trial process from providing a fair and reliable determination of guilt."
>
> Estes v. Texas, supra, p. 573.

Appellant Amsler completely ignores the pronouncement in Estes. His argument is without merit.

7. THE TRIAL COURT DID NOT ERR IN REFUSING THE REQUEST BY AMSLER'S COUNSEL TO TAPE THE PROCEEDINGS.

Appellant Amsler alleges that the court's denial of his request to tape record the proceedings was a violation of his constitutional right to a public trial [Amsler's Op. Br. pp. 61-62A]. The record will reflect that Amsler's counsel advised the trial court that he intended to tape the prosecution's closing argument, that he had taped "some of the pre-trial matters" without objection. The court stated that the court had no objection about it at that time and that if the recording devices were out of the sight of the jury, the court would not object, provided that if the recording be published to any person other than the three defendants and their counsel, the court would consider it a contempt [R. T. 4037-4038]. Thereafter, following the Prosecutor's opening argument to the jury, the court stated for the record:

> " . . . I would like to say for the record that it appears that by my ruling to accommodate Mr. Lavine upon his representation concerning his desire to have some record of the opening statement, that I have violated a local rule of this court. I have set a precedent which it is feared by many here that it might be used in some way to on a wedge to find devices to impeach the official record of this court.
>
> "I don't know what the intention of Mr. Lavine

was about it. I know what he represented to me, and I accept his representation. I will abide by the order, but I notice that there are some further restrictions that I will have to put on it. I know of no reason why counsel for the defendants' opening statement should be recorded, and I won't grant it. You may record the balance of the Government's opening statement, but I see no need for you to record the Government's closing argument. It has no purpose and I won't permit it. So in addition to the non-publication of any recording made by you, Mr. Lavine, that is already read into the record, I will state for the record that it would be a contempt if the recording made by you should in anywise ever be attempted by any person to be used to impeach in some way or to contradict or somehow impugn the official record." [R. T. 4097-4098].

Thus the court did not, as appellant Amsler puts it, deny Amsler's counsel the right to tape the proceedings [Amsler's Op. Br. pp. 61-62]. The court, in fact, allowed the recording of the Government's opening statement but saw no need for recording the Government's closing argument and advised Amsler's counsel that should the recording made by Amsler's counsel be used to impeach the official record, it would be a contempt. Amsler's counsel made no objection and cannot now raise this alleged error on this appeal [R. T. 4098-4099]. In all events, this was a matter within the

discretion of the trial court which was soundly exercised. Harris v. United States, 261 F. 2d 792 (9th Cir. 1958).

8. THE PROSECUTOR WAS NOT GUILTY OF ANY PREJUDICIAL MISCONDUCT.

Amsler contends that "the prosecutor was guilty of prejudicial misconduct in eliciting a conversation between defendant Keenan and F. B. I. Agent Murphy to the effect that Keenan considered and abandoned the idea of kidnapping Tony Hope, Bob Hope's son; that his testimony was the subject of a newspaper story which was prejudicial and that the trial judge erred in denying a motion for mistrial and a motion to strike the testimony [Amsler's Op. Br. pp. 62A-66, Cts. Ex. 10; R. T. 2768-2777]. There is no merit in these contentions. The reference to Tony Hope was set forth in an F. B. I. interview report which was given to all defense counsel several days before the witness testified [R. T. 2773-2774]. At the time the testimony was elicited by the prosecutor, no objection was made by defense counsel [R. T. 2677-2678]. Counsel for defendant Keenan cross-examined on the same subject matter, again without objection [R. T. 2712]. Appellant Amsler makes no showing other than his counsel's unsupported statement, that he was prejudiced by the evidence or the news release [Amsler's Op. Br. pp. 64-67]. This is understandable since there was no error in the admission of the evidence, it being proper evidence to go to the jury to be considered only as to intent and the

jury was so instructed [R. T. 2773-2775]. Toles v. United States, 308 F. 2d 590, 593 (9th Cir. 1962); Schwartz v. United States, 160 F. 2d 718 (9th Cir. 1947). In any event the testimony was offered only against the defendant Keenan [R. T. 2685] whose counsel did not object and who was cross-examined in the same area [R. T. 2712].

G. THE INSTRUCTIONS.

THERE WAS NO ERROR INVOLVED IN THE JURY INSTRUCTIONS GIVEN AND REFUSED.

1. THE RULES OF THIS COURT PERTAINING TO ASSIGNING JURY INSTRUCTIONS AS ERRORS ON APPEAL WERE NOT FOLLOWED.

The Rules of the United States Court of Appeals for the Ninth Circuit provide in pertinent part that appellant's brief shall:

> "When the error alleged is to the charge of the court, the specifications shall set out the part referred to totidem verbis, whether it be in instructions given or instructions refused, together with the grounds of the objections urged at the trial." [Rule 18, 2(d)].

[Cf., Amsler's Op. Br. pp. 11, 36 and errata sheet].

2. THE TRIAL COURT DID NOT ERR IN REFUSING TO GIVE AMSLER'S REQUESTED INSTRUCTIONS NOS. 1, 2, 4, 5, 6, 8, 9 and 10 BECAUSE IT GAVE IT, IN SUBSTANCE AND EFFECT, IN GIVING DEFENDANT KEENAN'S REQUESTED INSTRUCTIONS NO. 10 [R. T. 4007, 4008; C. T. 318].

The Court instructed:

"When one in the exercise of his own free will, and with knowledge of what is taking place with respect to his person, voluntarily and willingly consents to accompany another, the latter cannot be guilty of kidnapping the former so long as such condition of consent exists." [R. T. 4244-4245].

3. THE TRIAL COURT DID NOT ERR IN REFUSING TO GIVE APPELLANT'S REQUESTED INSTRUCTIONS NOS. 3, 7, 11 and 12.

These four requested instructions dealing with pre-arrangement by the victim or someone on his behalf, of the kidnapping for publicity, advertising or a hoax were, in substance and effect, given in whole or part by the Court when it instructed as follows:

"In connection with the defendants' theory, you are instructed that if you find from the evidence in this case that the act of alleged kidnapping as charged in count 2 was prearranged by Frank Sinatra, Jr., or

any person on his behalf for publicity, advertising, or otherwise, you must acquit the three defendants on the conspiracy charge to violate the kidnaping laws of the United States and of the kidnaping of Frank Sinatra, Jr., as charged in count 2."

Even assuming Amsler's proposed instructions were a correct and reasonably precise statement of the law, the Court is not bound to accept the language which counsel employs in framing instructions nor is it bound to repeat instructions already given in different language.

Agnew v. United States, 165 U.S. 36, 51 (1897).

Amsler's requested instructions taken on their face were not even correct or precise statements of the law. As to Amsler's requested instruction No. 3 ("If you believe that Frank Sinatra, Sr. put up $240,000 in money for the purpose of getting publicity for his son and not for ransom, you must acquit. . . .") [C. T. 119], obviously the victim's father's motives are not an element of the offense. As to Amsler's No. 7, i.e. "in this case the element of specific intent to commit a crime is essential before you can convict. If you find that the transactions were youthful pranks and not a crime you must acquit. . . ." [C. T. 123, emphasis added], on its face this instruction is, at the very least, poorly and imprecisely drawn (e.g., use of the word "case" instead of the appropriate count) and is not the law.

As to Amsler's requested Instruction No. 12, how could it

have been given as framed, i.e., "If you find in this case that the acts charges were prearranged for publicity or advertising or otherwise than for ransom or reward, then you must acquit . . ." [C. T. 128]. Prearranged by or on behalf of whom? Which count or counts are involved?

Amsler's requested Instruction No. 11 [C. T. 127] and the substance of those rejected instructions which contained proper statements of the law were given in superior, more precise fashion by the trial judge [R. T. 4244].

With respect to defendant's proposed Instruction No. 13 [Amsler's Op. Br. App. E 48], this, of course, is not even a jury question and the court properly instructed on the issue of "voluntariness" [R. T. 4260-4261].

With respect to defendant's proposed Instruction No. 21 [Amsler's Op. Br. App. p. 49], the proposed instruction is unintelligible, e.g., "kidnapping . . . is defined as the consideration paid . . .".

Finally it must be remembered that the trial judge has a duty to reject requested instructions not supported by some evidence. There is not a shred of evidence as to the portion of Instruction No. 21 dealing with money being "put up to secure publicity for Frank Sinatra, Jr." [R. T. 4244-4245].

H. THE TRIAL COURT DID NOT ERR IN DENYING APPELLANTS' MOTION FOR MISTRIAL BASED ON MATERIAL PUBLISHED BY THE VARIOUS NEWS MEDIA DURING THE TRIAL AND THE MANNER IN WHICH THE TRIAL JUDGE INTERROGATED THE JURY.

1. THE NATURE OF THE PUBLICITY.

After he had completed his testimony at the trial, Frank Sinatra, Jr. was interviewed by The Los Angeles Times and an article was published on February 29, 1964 entitled, "Sinatra, Jr. Disturbed Over Public's Attitude". A portion which counsel for defendant Keenan cited as being prejudicial to his client and on which he based a motion for mistrial [R. T. 2972-2973] was a paragraph of the article entitled, "People Doubt Me", in which Sinatra, Jr. complained that "people doubt me and give me an accusing look. The defense infers I am a fraudist." The article further quoted Sinatra, Jr. as stating, "The only individual that irritated me in this whole thing was that Barry Keenan. He was the boss. He gave the orders. He waved the gun authoritatively. He jeopardized the other two (Joseph Amsler and John Irwin). He sucked them in." [Court's Exhibit No. 12]. In another portion of the newspaper article the witness was quoted as giving the following reason why he cooperated with his three accused kidnappers. "I only did it because of the threat on my life. It's hard for people to understand that, but I had a gun in my neck and I couldn't duel with them in fisticuffs. I had no real chance to escape." [Court's Exhibit No.

12].

At the outset, we note that the foregoing publicity appears to be directed primarily at defendant Keenan, rather than appellants, and dealt with matters that had been extensively argued to the jury by counsel for the defense, testified to by witnesses and admitted into evidence [R. T. 16-24, 28, 34-35, Ex. 59, 61].

2. THE MANNER IN WHICH THE TRIAL COURT HANDLED THE MATTER.

The foregoing publicity was released on February 29, 1964. Counsel for defendant Keenan moved for a mistrial on March 2. Appellants Irwin and Amsler did not join in this motion. The trial court took the motion under submission and advised counsel that the court would wait until the close of the evidence in the case [R. T. 2973-2974]. After defendants had rested their cases the trial court dealt with defendant Keenan's motion for a mistrial by discussing the subject article with the jury as a whole generally and then with each juror individually [R. T. 3966-3980, inclusive]. The court directed that a transcript of that interview be transcribed and presented to the clerk and sealed, not to be opened until the close of the case and upon order of the court. The court, having been satisfied from its interrogation of the jury, denied the motion [R. T. 3981]. No objection was registered by defense counsel at that time. The next day appellants moved for a mistrial, contending that the court's interrogation of the jurors in the absence of the

defendants or their counsel was in violation of their constitutional rights [R. T. 4025-4027].

3. APPELLANTS HAVE FAILED TO MEET THEIR BURDEN OF DEMONSTRATING PREJUDICE.

The burden is on the appellant to show actual prejudice. As the Supreme Court stated in Beck v. Washington, 369 U.S. 541 (1962), at p. 558:

> "While this court stands ready to correct violations of constitutional rights, it also holds that 'it is not asking too much that the burden of showing essential unfairness be sustained by him who claims such injustice and seeks to have the result set aside, and that it be sustained not as a matter of speculation but as a demonstrable reality'." (quoting in part from United States ex. rel. Darcy v. Handy, 351 U.S. 454, 462 (1956); John Marshall et al. v. United States (9th Cir. 1966), decided January 27, 1966, No. 19,383.
>
> See also:
>
> Holt v. United States, 218 U.S. 245, 251 (1910);
>
> Cohen v. United States, 297 F.2d 760, 764 (9th Cir. 1962), cert. den. 369 U.S. 865;
>
> Dennis v. United States, 302 F.2d 5 (10th Cir. 1962);

United States v. Applegarth, 206 F. Supp. 686, 687 (D. C. Md. 1962).

Appellant Irwin incorrectly states that "upon questioning of each of the individual jurors by the judge, only one juror and one alternate juror indicated that they had seen the article, but both jurors stated that they formed no impressions from such reading" [Irwin's Op. Br. p. 33] [Emphasis added]. This is misleading. The record shows that Juror Gramm stated: "I'm sure I saw the headline but further than that, no, I didn't read it." He further stated he did not even "recall what it was, that he read none of the details and formed no opinion"[R. T. 3971]. Alternate Juror Beard stated he had "seen the captions" but had not read "any content" and formed no opinion whatsoever [R. T. 3977] [Emphasis added]. All the other jurors and alternates had no knowledge of the article whatsoever [R. T. 3966-3980].

Appellant Amsler thus makes no attempt at a showing of prejudice beyond the bare assertion of his counsel that the interview which "made headlines which would necessarily be picked up by other news media, was highly prejudicial to the defense . . ." [Amsler's Op. Br. p. 73].

Appellant Amsler misstates the facts when he refers to the court "entering the jury room" implying that the jury was deliberating [Amsler's Op. Br. pp. 66, 71].

Appellants have made no showing here which should disturb the general rule that the discretion of the trial court will not be upset on appeal except for a clear abuse of its discretion.

Marshall v. United States, 360 U.S. 310, 312 (1959);

Holt v. United States, 218 U.S. 245, 251 (1910);

Cohen v. United States, supra;

Yates v. United States, 225 F.2d 146, 165 (9th Cir. 1955), reversed on other grounds, 354 U.S. 298 (1957);

Madden v. United States, 20 F.2d 289, 294 (9th Cir. 1927);

Dranow v. United States, 307 F.2d 545, 564 (8th Cir. 1962);

Lewis v. United States, 277 F.2d 378 (10th Cir. 1960).

As to appellants' contention that the trial court committed prejudicial error in interrogating the jurors as to whether they had seen the publicity and as to its possible influence upon their deliberations, appellant Amsler does not even attempt to make a showing of actual prejudice [Amsler's Op. Br. pp. 66-71] and appellant Irwin simply asserts that since the trial judge did not tell the jury why the appellant and his counsel were absent, the jury " . . . may well have engaged in unwarranted speculation concerning appellant's guilt". Thus appellant Irwin himself appears to be indulging in speculation which is not the "demonstrable reality" as to prejudice which the Supreme Court announced in Beck v. Washington, supra [Irwin's Op. Br. p. 35].

Appellants have relied upon a line of cases which are inapposite to the case at bar. As appellant Irwin observes Evans,

Neal and Ah Fook Chang dealt with "out of presence instructions" [Irwin's Op. Br. pp. 35-36]. As the trial court below pointed out in denying the motion for mistrial:

> " . . . I can quite understand that if the court went to the jury and gave them some instructions or discussed any phase of the case with them, that is, the evidentiary phase of the case with them, that would be highly improper. But what I did yesterday in connection with my conference with the jury as a whole and each one of them separately was nothing more than what the Supreme Court has directed the United States District Courts to do. In the event that there is some out-of-court publication which the defendant claims tends to deny him of the right of free trial and due process, that the court makes its own investigation by talking to the jury and making a record of that fact and of the substance of the conversation, and then entering his ruling. That I have done, and it is by direct command of the United States Supreme Court." [R. T. 4027-4028, Amsler's Op. Br. pp. 69-71].

Marshall v. United States, 360 U.S. 310, 312 (1959); United States v. Accardo, 298 F.2d 133 (7th Cir. 1962).

In Holt v. United States, 218 U.S. 245, 251 (1910), Mr. Justice Holmes stated:

> " . . . If the mere opportunity for prejudice or corruption is to raise a presumption that they exist, it will be hard to maintain jury trial under the conditions of the present day. Without intimating that the judge did not go further than we should think desirable on general principles, we do not see in the facts before us any conclusive ground for saying that his expressed belief that the trial was fair and the prisoner has nothing to complain of is wrong."

All the cases relied on by appellants by their own language and as subsequently interpreted by later decisions are limited in their determinations of prejudice to the specific facts and particular circumstances involved in the setting of those trials.

4. TRIAL COURT DID NOT ABUSE ITS DISCRETION IN THE MANNER IN WHICH IT DEALT WITH THE MOTIONS FOR MISTRIAL AND THE PUBLICITY UPON WHICH THEY WERE BASED.

The trial court repeatedly admonished the jury during all stages of the trial and in its terminal instructions to listen to all of the evidence in the case and to decide the facts only upon the legally admissible evidence produced in court and the jurors were not to expose themselves to news media insofar as it related to this

case. That the trial court was more than sensitive to this problem is reflected in the instructions which were repeatedly urged upon the jurors collectively [R. T. 169, 607, 848, 1251, 1737, 2004, 2272, 2500, 2762, 2961, 3201, 3491, 3773, 3956]. Appellant Amsler's same counsel at the trial saw nothing wrong with a headline article in the same paper concerning the same case as to a theory of the defense on which no evidence had at that time been introduced [R. T. 1008-1009].

As this court said in Yates v. United States, 225 F. 2d 146 (9th Cir. 1955), reversed on other grounds, 354 U. S. 298 (1957), and very recently in John Marshall et al. v. United States (9th Cir. 1966), No. 19, 383, decided January 27, 1966:

> "The trial judge believed this jury could be trusted. It had received the individual interrogation, admonitions and instructions required. On well known principles relating to his better opportunity to observe and judge the intelligence, understanding and credibility of those persons he has personally interviewed, we will not, without substantial reason, substitute our own determination for that of the trial judge."

For the reasons stated, it is respectfully submitted that the judgments and sentences of the court should be affirmed.

Respectfully submitted,

MANUEL L. REAL,
United States Attorney,

JOHN K. VAN DE KAMP,
Assistant U. S. Attorney,
Chief, Criminal Division,

DONALD A. FAREED,
Assistant U. S. Attorney,
Chief Trial Attorney,

Attorneys for Appellee,
United States of America.

CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Donald A. Fareed
DONALD A. FAREED

APPENDIX "A"

"UNITED STATES DISTRICT COURT

"SOUTHERN DISTRICT OF CALIFORNIA

"In the Matter of Photographing, Broadcasting, Telecasting in Courtrooms, et cetera.	)	ORDER F I L E D JAN 20 1964 Clerk, U.S. District Court, Southern District of California By E. Drew, Deputy

WHEREAS, the Judicial Conference of the United States, at its meeting on March 8-9, 1962, adopted the following resolution (Report of the Judicial Conference of the United States proceedings March 8-9, 1962):

> "Resolved, That the Judicial Conference of the U. S. condemns the taking of photographs in the courtroom or its environs in connection with any judicial proceedings, and the broadcasting of judicial proceedings by radio, television, or other means, and considers such practices to be inconsistent with fair judicial procedure and that they ought not to be permitted in any federal court."

and,

> "WHEREAS, said Resolution enlarges the provisions of Federal Rules of Criminal Procedure, Rule 53, prohibiting photographing, broadcasting

and televising in courtrooms during the progress of judicial proceedings so as to include not only criminal but also civil proceedings, and so as to exclude photographing, broadcasting and televising not only from the courtrooms, but also from its 'environs'; and

"WHEREAS, Canon 35 of the American Bar Association provides in part as follows:

> 'Proceedings in court should be conducted with fitting dignity and decorum. The taking of photographs in the courtroom during sessions of court, recesses, or between sessions, and the broadcasting or televising of court proceedings are calculated to detract from the essential dignity of the proceedings, distract the witness so that his testimony degrades the court and creates misconception with respect thereto in the minds of the public, and should not be permitted.'

and

"WHEREAS, this Court requested clarification of the above quoted Resolution of the Judicial Conference of the United States as it may affect Naturalization proceedings and was advised that this matter had specifically been considered and that the Resolution did not exclude Naturalization proceedings, even

though American Bar Association Canon 35, in a portion not quoted, excepted such proceedings from the Canon; and

"WHEREAS, subsequently thereto the Judicial Conference of the Ninth Circuit requested an amendment to the Resolution to permit 'news media' courtroom photography or telecasting of naturalization and ceremonial matters to be had in accordance with local rule of court, which request has not yet been acted upon; and

"WHEREAS, in order to avoid misunderstanding with representatives of news media, it appears necessary to clarify the subject of photography, telecasting and broadcasting from or in the courts and environs in order to conform to the standards set by the Judicial Conference of the United States;

"NOW, THEREFORE, IT IS HEREBY ORDERED that all forms, means and manner of taking photographs, or broadcasting or televising on or from the entire second floor or any part thereof, and Hearing Rooms No. 1 and No. 2 and corridors leading thereto on the Main Street Floor, of the United States Post Office and Court House Building, located at 312 North Spring Street, Los Angeles, California, are hereby prohibited during the course of, or in connection with, any judicial proceedings, whether court is actually in

session or not.

"Dated: January 20, 1964.

"Peirson M. Hall
"Peirson M. Hall, Chief U.S. District Judge

"Leon R. Yankwich
"Leon R. Yankwich, U.S. District Judge

"Wm. C. Mathes
"Wm. C. Mathes, U.S. District Judge

"Harry C. Westover
"Harry C. Westover, U.S. District Judge

"James M. Carter
"James M. Carter, U.S. District Judge

"Wm. M. Byrne
"Wm. M. Byrne, U.S. District Judge

"Thurmond Clarke
"Thurmond Clarke, U.S. District Judge

"----------(Absent)
"Fred Kunzel, U.S. District Judge

"M. D. Crocker
"M. D. Crocker, U.S. District Judge

"Albert Lee Stephens, Jr.
"Albert Lee Stephens, Jr., U.S. District Judge

"Charles H. Carr
"Charles H. Carr, U.S. District Judge

"Jesse W. Curtis
"Jesse W. Curtis, U.S. District Judge

"E. Avery Crary
"E. Avery Crary, U.S. District Judge"

APPENDIX "B"

Chapter II, Rule 3, Local Rules, United States District Court for the Southern District of California, Central Division:

"NEW RULES GOVERNING ASSIGNMENT.

"Rule 3. The criminal calendar of the central division.

"It is Ordered:

"(1) All criminal cases and proceedings filed in the Central Division of this Court shall be assigned to a Judge of the Central Division, other than the Chief Judge, in the order of seniority to begin with Judge Harry C. Westover who is hereby assigned as such Judge until January 1, 1962.

"(2) The Judge of the Criminal Department shall preside over the criminal calendar for a period of a calendar year, to be followed, for a like period, by another Judge in the order of seniority, excluding the Chief Judge and Judges assigned regularly to the Northern and Southern Divisions of the District.

"3(a) Each Judge to whom is assigned the criminal calendar shall hear all arraignments, pleas, motions and proceedings other than trials, provided that when a case has been transferred from the Criminal Department, and a superseding or other indictment or information relating to the same case

is filed, all arraignments, pleas, motions and other proceedings shall be heard by the Judge to whom the original case was transferred.

"(b) When a plea of guilty or nolo contendere is entered, the Judge in the Criminal Department shall retain the case for disposition and sentence.

"(c) When a plea of not guilty is entered, the Judge in the Criminal Department shall transfer the case, in the order now employed by the Clerk of this Court in assigning civil cases to the Judges upon filing, to another Judge regularly assigned and sitting full time in the Central Division, other than the Chief Judge and himself, for setting on his own calendar.

"(d) The Judge in the Criminal Department may also transfer to another Judge, in the manner herein provided, the hearing of motions or proceedings, in any case, when he is of the view that the matter involves questions of law or fact which should be determined by the Judge who is to try the case. He may also take over for trial from another Judge any criminal case, if both Judges so agree.

"(4) The Judge in the Criminal Department is hereby empowered during his incumbency, to transfer, in the manner provided in 3 (c) and 3 (d) hereof, motions or matters and cases for trial to the Judges regularly assigned and sitting full time

in the Central Division, other than the Chief Judge, each of whom shall accept the motions, matters and cases so transferred, unless he is disqualified.

"(5) When a plea of not guilty has been entered and the Clerk has opened the envelope to remove the card indicating the name of the transferee Judge, all further proceedings, including a change of plea, shall be before the transferee Judge.

"(6) Whenever the Judge in the Criminal Department is unable, for any period of time, because of illness, disability, unavoidable absence or other justifiable causes, to perform his duties, he is authorized to arrange with any other Judge of the District for the performance of his duties. Should he fail or be unable to do so, the Chief Judge may designate another Judge to perform such duties during such period of inability or disability.

"(7) Rule III of the 'Rules Governing Assignment' (the text of which is printed on pages 43 and 44 of the Printed Rules of this Court) is hereby rescinded in its entirety.

"(8) The Order of the Judges of this Court dated April 4, 1960, filed April 11, 1960, entitled 'Civil Case Credit for Short Criminal Cases,' is hereby also rescinded in its entirety.

"(9) Rule II of the 'Rules Governing Assign-

ment' (the text of which is printed on page 42 of the Printed Rules of this Court) is hereby amended by striking the word 'civil' wherever it occurs in that Rule, including the Title thereof."

TIME OF CALL*	SOURCE AND BY WHOM	PARTY CALLED AND LOCATION	SUBJECT DISCUSSED	EXHIBIT NUMBER	RECORD REFERENCE REMARKS
(1) [illegible]	Irwin, assisted by Amsler (Mason Avenue hideout, Canoga Park, California, Telephone Number 341-6056	Frank Sinatra, Sr. (Mapes Hotel, Reno, Nevada) Telephone Number 702 FA-31611	Father allowed to speak with his son - told they want money and to expect further calls	160 40F 61	Overt Act #13, Count One Count Three C. T. 4, 6 R. T. 1320, 1674-77, 3833, 3840-3842
(2) 11:40 a.m.	ibid	ibid	Sinatra, Sr. out - his attorney Mickey Rudin takes call - told there would be later calls	168 40F 61	Overt Act #14 Count One C. T. 4 R. T. 1680, 3845
(3) 11:50 a.m.	ibid	ibid	Sinatra, Sr. told to go to Ron's Service Station, 201 N. Carson - bring a pencil and note pad	162 40F 61	Overt Act #15 Count One C. T. 4 R. T. 1682, 1685-1687, 3845
(4) 12:28 p.m.	ibid	ibid	Attorney Rudin took call - Sinatra, Sr. had left - caller told of mistaken address as to Ron's Service Station	169 40F 61	Overt Act #16 Count One C. T. 4 R. T. 1682-1688, 3850
(5) 12:50 p.m.	ibid	Sinatra, Sr. at Ron's Service Station, Carson City, Nevada Telephone Number GR. 2-9890	"We want $240,000" in denominations specified - told to go to Oxoby Chevron Station, Carson City, Nevada where he would receive another call	180 40F 48 61	Overt Act #17 Count One Count Four C. T. 4, 8 R. T. 1335-1341, 3850
(6) 1:10 p.m.	ibid	Sinatra, Sr. at Oxoby's Station, Carson City, Nevada	Told to obtain courier to handle ransom payment. Asked for telephone number of victim's mother (Bel Air). Told to go there that night when he would be called.	40F	Overt Act #18 Count One Count Five C. T. 3, 9 R. T. 1341-1345; 3840-3851; 3898; 3224-3229

* Calls transcribed on December 10, 1963

TIME OF CALL	SOURCE AND BY WHOM	PARTY CALLED AND LOCATION	SUBJECT DISCUSSED	EXHIBIT NUMBER	RECORD REFERENC - REMARKS
(7) [illegible] a. m.	ibid	Sinatra, Sr. at residence of Mrs. Sinatra, Bel Air, California	Told to go to Standard Station at Camden & Santa Monica Blvd., Beverly Hills, California where he would receive next call.	Ex. 61 p. 19	Overt Act #19 Count One C. T. 4 R. T. 1349, 1714-1717
(8) 9:57	ibid	Sinatra, Sr. at Standard Station Beverly Hills, California	Told to have courier with the ransom money go to a specified telephone at Los Angeles International Airport where courier would be contacted.	Ex. 61 p. 19	Overt Act #20 Count One C. T. 4 R. T. 1350-1353; 1326

APPENDIX "G"

NO. 19509

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOSEPH CLYDE AMSLER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court
for the Southern District of California
Central Division

APPELLANT JOSEPH C. AMSLER'S REPLY BRIEF

MORRIS LAVINE
215 West 7th Street
Los Angeles, California 90014

MAdison 7-3241

Attorney for Appellant Amsler

TOPICAL INDEX

TABLE OF AUTHORITIES CITED

CONSTITUTION

STATUTES

RULES

NO. 19509

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APPELLANT JOSEPH C. AMSLER'S REPLY BRIEF

DELAYS IN OBTAINING RECORD

The appellee has made much of the delay in getting this appeal before this Court. Its argument is a plain demonstration on why it was never the intent of the makers of the Constitution, or even of Congress, that a foreign judge, to-wit: an Oregon judge and his Oregon entourage, his court reporter, his bailiff, his clerk and his secretary, should move over 1000 miles into Los Angeles and take over.

The delays which thus resulted in trying to get a record together are evidence that such situation should not have existed. Constantly we were faced with efforts to get a true and correct record which is the constitutional right and without which a defendant is deprived of due process of law guaranteed equally by the Fifth and Fourteenth Amendments. (Chessman v. Teets, 354 US 156, 1 L.ed.2d 1253)

As said in the Chessman case, at 1 L.ed.2d 1259-60:

> "Without blinking the fact that the history of this case presents a sorry chapter in the annals of delays in the administration of criminal justice, we cannot allow that circumstance to deter us from withholding relief so clearly called for. On many occasions this Court has found it necessary to say that the requirements of the Due Process Clause of the Fourteenth Amendment must be respected, no matter how heinous the crime in question and no matter how guilty an accused may ultimately be found to be after guilt has been established in accordance with the procedure demanded by the Constitution. Evidently it also needs to be repeated that the overriding responsibility of this Court is to the Constitution of the United States, no matter how

late it may be that a violation of the Constitution is found to exist. This Court may not disregard the Constitution because an appeal in this case, as in others, has been made on the eve of execution. We must be deaf to all suggestions that a valid appeal to the Constitution, even by a guilty man, comes too late, because courts, including this Court, were not earlier able to enforce what the Constitution demands. The proponent before the Court is not the petitioner but the Constitution of the United States."

Thus we are grateful to the government counsel for calling attention to much needed requests for extensions of time, each based upon an effort to get a completed record of the case, at least insofar as we could do so. Our inability to see and confer with the reporter or the judge, who were many miles away, was certainly not the intention of the framers of our Constitution. Thus it is, as stated in Chessman v. Teets, supra, "the Constitution of the United States" that is the proponent before the Court, in this case.

THE TRIAL JUDGE WAS UNAUTHORIZED
TO SIT IN THIS DISTRICT

This Court can take judicial notice of the fact that

judges of the District Court are appointed by the President of the United States for a specific District following a recommendation by the Senators of that state as a party in power. If those Senators happen to be of an opposite party, the patronage can go to the congressional delegation of the particular state. The judge who is appointed is necessarily a lawyer of the state and District where his appointment takes place. He is not a non-member of the State Bar of the state of his appointment and possibly a member of the Bar of some other state.

Section 2, Article 3 of the Constitution of the United States provides:

> "Trial of Crimes.
>
> "3. The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the state where said crime shall have been committed; but when not committed within any state the trial shall be at such place or places as the Congress may by law have directed."

It is implicit in this Section that the word "trial" encompasses the court, the jury and all parties participating in such a trial to be in the state and District.

While the appellee says there have been no cases regarding the same, it is interesting that among the com-

plaints in the Declaration of Independence, adopted in Congress July 2, and signed July 4, 1776, that one was "For transporting us beyond seas to be tried for pretended offenses" and "He has combined with others to subject us to a jurisdiction foreign to our Constitution and unacknowledged by our laws; giving his assent to their acts of pretended legislation".

The government has cited the case of McDowell v. U.S., 159 US 596, 598, an 1895 case. This involved the vacancy of a judicial place from January 1st to February 12th and the question arose as to whether the court could fill the vacancy from another District and it was held that it could do so.

In Lamar v. U.S., 241 US 103, a 1916 case, the question was raised as to whether a Michigan judge could sit in a New York case or whether this usurped the function of the President of the United States.

Neither of the above cases raised the question under Section 2, Article 3 of the original Constitution of the United States establishing the judiciary for the trial of criminal cases whether the court had to be a court in the state and District where the crime was committed. We respectfully contend that neither of these cases reaches this point nor has it ever been decided and we contend that insofar as the statute of Congress is concerned

insofar as it covers criminal cases, it violates Article 3, Section 2 of the Constitution of the United States.

The article by Judge Yankwich in 3 FRD 481 merely discussed shifting judges around and using judges in various Districts which, of course, gives federal judges a nice trip and possibly, at times, a vacation, but its purpose was not meant for that and it certainly is not intended to cover criminal cases where the life and liberty of defendants is at stake.

We submit, also, that even assuming that a judge might be appointed or designated to relieve in congested Districts rather than to supplant a vacancy or an emergency situation, no such condition was shown to have existed in Los Angeles where the case was sent to the Master Calendar judge of the Criminal Division. There was no showing that local judges would not or were not available to try the case and the procedure in getting an out of town judge on the morning of the day of the arraignment and shoving the case over to him was something that we respectfully submit violated due process of law guaranteed by the Fifth Amendment to the Constitution of the United States and Section 2 of Article 3 of the Constitution.

Insofar as McDowell v. U.S., supra, and Lamar v. U.S., supra, may be construed to hold any such authority, we respectfully ask a re-examination of these cases in the

light of the constitutional provisions and statutory purpose and the power of appointment of the President and the confirmation by the Senate in a particular District by a particular Senator.

We submit that this question is of great importance in the administration of criminal justice which has not been but should be passed upon now by this Honorable Court.

ADMINISTERING OF OATHS TO THE JURY

The Oregon clerk was not authorized in California to administer oaths at the time the oaths were administered to the prospective jurors.

The appellee says: "This Court should note the fact that the trial judge, out of an abundance of caution, himself administered the oath to the jury". However, this was after the jury had been selected and this is a confession that even the trial judge thought, out of an abundance of caution, that there had been error by having a non-clerk, virtually a layman, purportedly swear prospective jurors who were supposedly question, not under oath.

Appellee fails to mention that it was the Oregon clerk who administered the purported oath to the prospective jurors and that this whole procedure was a nullity

as if it had been conducted in the street or at the state courthouse or some other place where there was no court actually organized or in session.

The whole procedure, therefore, was a violation of due process of law guaranteed by the Fifth Amendment to the Constitution of the United States.

ASSIGNMENT AND TRANSFER OF JUDGES

We respectfully submit that insofar as Title 28, Section 292(b) is concerned, it is unconstitutional and in violation of both Article 3, Section 2 of the Constitution of the United States and of the due process clause of the Fifth Amendment to the Constitution of the United States.

Congress had no more jurisdiction to direct that crimes should be tried before a foreign trial judge, transported to Los Angeles, a foreign court reporter, a foreign clerk, transported to Los Angeles from Oregon, than if they had come from China or Europe, nor did the Chief Judge's order designating the Oregon judge to sit in Los Angeles to hold the District Court create the power given solely by the President of the United States and requiring the approval of the United States Senate before such judge is empowered to sit in the Southern District of California, Central Division.

The lack of authority on this specific point and question here raised is contrary to the power vested by the Constitution. Only two cases are referred to by the government in respect to the situation. Neither of them, we think, has the factual situation here, nor do we find that the questions which we have raised have been fully argued or presented in McDowell v. U.S. (1895), 159 US 596, 598, 40 L.ed. 271, nor in Lamar v. U.S., 241 US 103, 60 L.ed. 912.

We respectfully submit that the moving of an Oregon judge into the California area in a criminal case does violate Section 2, Article 3 of the Constitution of the United States, not clearly argued in either of the cases referred to; that it is not truly a trial within the state in which it occurred when a foreign judge sits; that such a proceeding violates due process of law guaranteed by the Fifth Amendment to the Constitution of the United States. District Courts are solely the creation of statute and so are the judges who are appointed. It is quite evident that it never has been intended to appoint a judge, say, familiar only with Florida law or familiar only with New York law, and the methods there employed, to preside in other places.

We respectfully submit that by reason thereof, the whole proceedings were and are a nullity.

TRANSFER OF THIS CASE TO THE OREGON JUDGE

In connection with this point, we respectfully point out also that the government has not met our issue as to the manner in which the case was suddenly taken from the Presiding Judge of the Criminal Division of the District Court in Los Angeles and transferred to an Oregon judge on the morning of the proceedings in which the case was ordered and set for trial.

Local Rules as to the manner cases are to be assigned, when adopted by the judges, have the force and effect of law and the failure to follow this procedure because of the case, the nature of the publicity involved and the matters involved in the case, did not justify violating Local Rules.

A trial has always encompassed a court regularly constituted with a judge and its regular attaches, the clerk, the bailiff, the court reporter, and others. Its jurisdiction is territorial and extends only within the state and District where it is located. It is an assumption not granted either by the Constitution or any authority under the Constitution to extend this jurisdiction in respect to any part or member of that court, and we respectfully submit that a court with a foreign judge is illegally and unconstitutionally constituted and that its

acts are coram non judice.

SELECTION OF THE JURY - THE "ARIZONA SYSTEM"

The jury was improperly impanelled. Again, we submit that the errors of the Oregon trial judge put into effect the so-called "Arizona system" in a California court. Also, he limited the number of challenges in the case without regard to the fact that the statute in this case provides for the death penalty and therefore authorizes a larger number of challenges, to-wit: 20 peremptory challenges.

Appellee says we were not entitled to 20 challenges because the victim wasn't harmed, but the test is not whether the victim was harmed but what the statute authorizes us to have. It is presumed that the government would put on everything possible in its case and we were not bound by what the government proof ultimately showed in what we were entitled to have at the beginning of the trial.

Only a few cases are cited and none appear to have reached the United States Supreme Court from the California court. We submit that Congress has made the statute and its provisions determinative of the number of jurors and not what actually has happened in the case or what

the evidence may show as to whether there was bodily harm or not.

The trial judge, therefore, cannot at the outset of the case limit the selection of the jurors to what he thinks the evidence may show or what the government may say or what it is proposed will be produced. The statute itself, under the charge, carries the death penalty.

ERROR IN INSTRUCTIONS

The instruction of the trial judge which we respectfully contend invaded the province of the jury and destroyed the defense of the defendants as to the purpose of the trip, certainly took away from the jury the right to determine whether Sinatra, Jr. had acted freely and voluntarily and did not give the other side of the situation to the jury.

We respectfully submit that we did raise the question of the errors in the court's denials of the instructions.

DEFENDANT'S RIGHT TO CALL FRANK SINATRA, SR., AS A WITNESS

The government contends that we did not have the right to have Sinatra, Sr. returned as our witness. It will be remembered that he was only present in respect to the matters as to his testimony on behalf of the govern-

ment that the kidnaping was not a part of a publicity stunt or a hoax. (R.T. 1358-1361) It was agreed that he would be available as a witness for the defense and certainly the defendant was entitled to have Sinatra, Sr. present as his own witness in respect to all of the circumstances surrounding the securing of the money and matters relating to his participation in the whole matter. We were not bound or limited merely to questioning him on cross-examination and the court properly ordered a subpoena issued for Sinatra, Sr. In the meantime, however, he had taken a trip to Europe.

Defense counsel is not required to reveal his defense or outline the questions intended to be asked of Sinatra, Sr. and it was error for the court to have quashed the subpoena. The statement of the government is that there was "not one iota of direct evidence to this effect" as to the kidnaping being a prearranged publicity stunt or hoax. There was no admission by any of the parties, if that is what the government calls "direct" evidence. However, there were a large number of newspaper articles and pictures introduced showing the benefits which young Sinatra had obtained as the result of this affair. See defense exhibits in case.

Wide publicity was given to it. At least 50 newspapermen and television men were at the house when he

returned. Before returning he had hidden in the trunk of an automobile until he got to the house where he could confer with his father and with the publicity people and the attorney handling the Sinatra matters. The pictures on television and in the newspapers and magazine articles went far and wide and the court can take notice of the circumstantial evidence thus involved, which the defense certainly has a right to present and argue to the jury.

DEFENDANT WAS DENIED A PUBLIC TRIAL

In respect to the error excluding photographers and television cameras from the courtroom and adjacent corridors of the second floor, we are mindful of not only the decision in Estes v. Texas, 381 US 532, 14 L.ed.2d 543, but also of the Sheppard case, 34 Law Week 4451.

We believe that the constitutional guarantee of a public trial includes the right of photographers and television people as well as any other medium to see and hear and report electronically everything that occurred. We are mindful of the fact that in urging this result we are flying in the face of the recent decisions in an effort to harmonize the relationship between the press and the courts. Nevertheless, we think that insofar as full and fair recording is concerned, they should have the same rights as any other medium without which the defendant,

who in this case had rights, too, was denied a full public trial.

THE ALLEGED CONFESSION

Since the purported confessions of Irwin were made in the absence of Amsler and in the absence of any attorney for Irwin and the absence of any attorney for Amsler, we respectfully submit that they should have been excluded under the doctrines of Massiah v. U.S., 377 US 201, 12 L.ed.2d 356, Escobedo v. Illinois, 378 US 478, 12 L.ed.2d 356 and Mallory v. U.S., 354 US 449, 1 L.ed. 2d 1479, and cases there cited.

REFUSAL TO GIVE NAMES AND ADDRESSES OF JURORS AND WITNESSES

We again reassert that it is not what happened in the trial and that the alleged kidnaping victim was released unharmed but what the statute itself provides that governs the rights of the defendant.

Here, Title 18, Section 1202, the kidnaping statute, provides for a death penalty and is a capital offense. Under Title 18, U.S. Codes, defendant is entitled, under Section 3432, to the names and addresses of all the prospective jurors and witnesses at least three days prior to trial. These were refused to him in contravention of

the mandatory provision of the statute.

Furthermore, Brady v. Maryland, 373 US 83, 10 L.ed. 2d 215, provides that an accused is entitled to any names and addresses of any witnesses who may prove his innocence. The defendants sought and were denied the names of the roadblock officers who stopped the automobile in which Frank Sinatra, Jr. was riding and were refused this information prior to trial. Brady v. Maryland holds that such a refusal is a denial of due process of law, stating:

> "We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to the guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."

SUFFICIENCY OF THE EVIDENCE

In connection with the sufficiency of the evidence to sustain the conviction as to appellant Amsler, the government states that it set forth the facts in connection with the statement of facts which shows the abundance of evidence to support the conviction of the appellant Amsler. We have challenged this sufficiency because of lack of proof of transportation and because of the consent of Sinatra, Jr.

The government has misconceived our position. We do not believe that the conspiracy count has been established removing the improper evidence secured in violation of the Fourth and Fifth Amendments and also in the light of Sinatra, Jr.'s admission and conduct on the whole trip. Counsel, in respect to Sinatra Jr.'s statement that he consented, overlooks the abundance of evidence not only of the admissions of Sinatra, Jr. as to his consent, but as to his whole conduct in this ride.

Furthermore, the government says that Sinatra, Jr. was not told anything about being the victim of a kidnaping until they reached the house on Mason Avenue in Canoga Park, whereas his roommate, within a few minutes after the alleged hold-up, had notified various people in the hotel that Sinatra, Jr. was kidnaped. A roadblock was set up and all kinds of officers from Nevada were present at the roadblock with guns, etc. The two are just inconsistent with "kidnaping". A single statement to one of the roadblock officers would have ended the whole matter. Sinatra, Jr. did not do so.

SPLITTING UP OF THE COUNTS

In connection with the kidnaping statute, Section 1201, Title 18, it is inconceivable that Congress intended it to be split up into a series of offenses. Title 18,

Section 1201 provides that whoever knowingly transports any person who has been unlawfully seized, consigned, inveigled, decoyed, kidnaped, abducted or carried away and held for ransom or reward or otherwise, is liable either to life or to death penalties.

In imposing such a penalty, Congress took into consideration that it would embrace not only transportation but would embrace all of the elements that are involved in a kidnaping case, to-wit: communication, which is an essential element of kidnaping for ransom, or communication by telephone or telegraph or mail, all methods of communcation. It also provided that all of these elements would make up the single crime of the violation of Section 1201 with the maximum penalty being either life imprisonment or death. It did not intend to have the crimes split up into conspiracy, under Section 371, and conspiracy under Section 1201.

Where there is a specific statute it covers the general subject matter. (Cohen v. U.S., 201 F.2d 386, and cases therein cited.)

The court, in interpreting 18 USC 1201, expanded the scope to cover not only for profit but for any other reason for which a person is seized or carried away and involved all the elements which necessarily go with such a kidnaping. (U.S. v. Healy, 376 US 75, 11 L.ed.2d 527; Gooch v.

U.S., 227 US 124, 80 L.ed. 522; Poindexter v. U.S., 139 F.2d 158; U.S. v. Bazzell, 187 F.2d 878, 883; U.S. v. Parker, 103 F.2d 857, 860; Wheatley v. U.S., 159 F.2d 599, 600)

We therefore respectfully disagree with the appellee's brief that the offenses of receiving, possessing and disposing of ransom money to be delivered for the release of kidnap victim, after he was kidnaped and transported, is not covered by the conspiracy provision in Title 18, Section 1201. In fact, the very essence of kidnaping for the purpose of ransom and the very language of the statute provides that any person who has been carried away and held for ransom, reward or otherwise, necessarily includes the proof that the person who is charged with holding received, possessed and disposed of ransom money for the release of a kidnap victim, which is an essential portion of the corpus delicti proving Section 1201 of Title 18.

Thus the statute, Section 1201, contrary to the contention of the government, does so provide.

THE INDICTMENT WAS DUPLICITOUS

The government apparently has missed our point in connection with the argument that the indictment, under Title 18, Section 1201, covered the entire charge.

Each and all of the acts charged against appellant, if true, were embraced within Section 1201. Therefore,

charging him under Section 371 of Title 18 was repetitious and therefore duplicitous. It matters not that Section 371 carried a lesser penalty. He was charged with violation of Section 1201 of Title 18, which carried a greater penalty, and was convicted of Section 1201 with the greater penalty. Therefore, the charge in respect to the greater penalty embraced everything and it was highly prejudicial to charge him with separate and duplicitous matters.

This is not a case of repeal by implication but a case of duplicitous charging of an indictment. It is the law of criminal pleading that when a statute includes all of the elements in the specific statute that it is to be followed and that the general statute, therefore, is not to be followed in respect thereto since the specific statute descends to particulars as it did in this case on the question of Section 1201 of Title 18.

DENIAL OF RIGHT TO TAPE PROCEEDINGS

We have argued the matter of taping the proceedings as a denial of the right to record all of the comments for the benefit of counsel so that preparation might be properly made for answer to the arguments that were made and to re-examine those thoughts. We think that counsel was unduly limited in this respect.

COURT'S ERROR IN ENTERING JURY ROOM

We have also presented in our opening brief the improper conduct of the judge in going into the jury room and addressing members of the jury without the presence or knowledge of defendants or their counsel and that this, alone, entitles the appellant to a reversal of the judgment below.

ILLEGAL SEARCHES AND SEIZURES

There was an illegal search and seizure of moneys when Irwin's car was searched in the absence of counsel and in the absence of appellant Amsler. The search was illegal and in violation of the Fourth Amendment to the Constitution of the United States. (Massiah v. U.S., 377 US 201, 12 L.ed.2d 356)

SEVERANCE

Appellant Amsler contended that he should have been granted a separate trial. Remembering the evidence of Irwin, who had made a purported confession outside of the presence of Amsler, and without the advice of benefit of any counsel, Amsler was highly prejudiced by the use of this confession which was played to the jury on a tape and read to the jury and testified to at length, all of which involved appellant Amsler and was secured in the

absence of appellant. Certainly it was an abuse of discretion under Rule 14, Federal Rules of Criminal Procedure.

People v. Aranda, 63 Cal.2d 518, cited by us in our opening brief, is a well reasoned case which holds that prejudice, under these circumstances, occurs. In that case the Supreme Court of California, speaking through Justice Traynor, said:

> "In Delli Paoli v. United States, 352 US 232 [77 S.Ct. 294, 1 L.ed.2d 278], the Supreme Court of the United States approved this rule in joint trials in the federal courts. In justifying its decision, the court said: 'It is a basic premise of our jury system that the court states the law to the jury and that the jury applies that law to the facts as the jury finds them. Unless we proceed on the basis that the jury will follow the court's instructions where those instructions are clear and the circumstances are such that the jury can reasonably be expected to follow them, the jury system makes little sense.' (P. 242)
>
> "To some judges, however, the procedure cannot be justified. It 'results in serious impairment of the rights of the accused to a fair consideration by an impartial jury of the competent evidence procedued against him.' (People v. Fisher,

249 N.Y. 419, 428 [164 N.E. 336, 339]@Lehman, J., dissenting]; see People v. Buckminster, 274 Ill. 435, 446-448 [113 N.E. 713, 715-716]; United States v. Delli Paoli (2d Cir.) 229 F.2d 319, 322 [Frank, J., dissenting].) It is a 'fiction' and a 'naive assumption' about the way juries can function. (See Krulewitch v. United States, 336 US 440, 453 [69 S.Ct. 716, 93 L.ed. 790] [Jackson, J., concurring]; People v. Chambers, 231 Cal.App.2d 23, 33 [31 Cal.Rptr. 551].) The rule calls upon the jury to perform 'a mental gymnastic which is beyond, not only their powers, but anybody's else.' (Nash v. United States (2d Cir.) 54 F.2d 1006, 1007; see Meltzer, Involuntary Confessions: The Allocation of Responsibility between Judge and Jury, 21 U.Chi. L.Rev. (1954) 317, 326.) Writing for the four dissenters in Delli Paoli v. United States, 352 US 232 [77 S.Ct. 294, 1 L.ed.2d 278], Justice Frankfurter stated: 'The fact of the matter is that too often such admonition against misuse is intrinsically ineffective in that the effect of such a nonadmissible declaration cannot be wiped from the brains of the jurors. The admonition therefore becomes a futile collocation of words

and fails of its purpose as a legal protection to defendants against whom such a declaration should not tell. ... The Government should not have the windfall of having the jury be influenced by evidence against a defendant which, as a matter of law, they should not consider but which they cannot put out of their minds.' (P. 247) To these critics, the rule is not basic to our jury system and is not needed to preserve the system. Instead it is a rule that perverts the jury trial since it calls upon ordinary lay people to obey an instruction that every judge realizes cannot be obeyed. It fosters what one scholar refers to as our 'inconsistent attitude' toward juries. We treat them ;at times as a group of low-grade morons and at other times as men endowed with a superhuman ability to control their emotions and intellects.' (Morgan, Some Problems of Proof under the Anglo-American System of Litigation (1956) p. 105.)

"Whether or not these criticisms of the present rule require its abrogation, a question we consider later herein, they clearly foreclose any assumption that error in admitting a confession that implicates both defendants is ren-

dered harmless to the nonconfessing defendant by an instruction that it should not be considered against him. At best, the rule permitting joint trials in such cases is a compromise between the policies in favor of joint trials and the policies underlying the exclusion of hearsay declarations against one who did not make them. When, however, the confession implicating both defendants is not admissible at all, there is no longer room for compromise. The risk of prejudicing the nonconfessing defendant can no longer be justified by the need for introducing the confession against the one who made it. Accordingly, we have held that the erroneous admission into evidence of a confession implicating both defendants is not necessarily cured by an instruction that it is to be considered only against the declarant. (People v. Gonzales, 136 Cal. 666, 668-669 [69 P. 487]; see Greenwell v. United States (D.C. Cir.) 336 F.2d 962, 968, 969; People v. Donovan, 13 N.Y.2d 148, 151 []32 N.Y.S.2d 841, 193 N.E.2d 628]; People v. Waterman, 9 N.Y.2d 561, 567 [216 N.Y.S.2d 70, 175 N.E.2d 445]; compare People v. Rudish, 294 N.Y. 500 [62 N.E. 2d 77] with Malinski v. New York, 324 US 401,

410-412 [65 S.Ct. 781, 89 L.ed. 1029].) The giving of such instructions, however, and the fact that the confession is only an accusation against the nondeclarant and thus lacks the shattering impact of a self-incriminatory statement by him (see People v. Parham, 60 Cal.2d 378, 385 [22 Cal.Rptr. 497, 384 P.2d 1001]) preclude holding that the error of admitting the confession is always prejudicial to the nondeclarant."

The alleged confessions of Irwin were certainly highly prejudicial to the appellant Amsler and therefore resulted in a miscarriage of justice. One could not say that the jury did not consider all of these matters.

In the situation that Amsler was in, he necessarily was faced with the fact that the jury, consciously or subconsciously, would merge all of the evidence. Prejudice, therefore, resulted.

The Supreme Court of the United States in Jackson v. Denno, 378 US 368, 12 L.ed.2d 908, 1 ALR 3d 1205, held that a defendant was constitutionally entitled to have a trial judge or possibly a separate jury determine that his confession was voluntary before it was submitted to a trial jury for an assessment of its credibility. The court did not believe that a jury could separate the issue of the

voluntariness of an extrajudicial statement from the issue of its truth.

In Pointer v. Texas, 380 US 400, 13 L.ed.2d 923, the Supreme Court held that under the due process clause of the Fourteenth Amendment the Sixth Amendment guarantee of a defendant's right to be confronted by the witnesses against him included the right to cross-examine these witnesses. It found that when the prosecution in a criminal trial introduced the prior testimony of a witness who had not been subject to effective cross-examination the defendant's rights of confrontation were violated. This was approved also in Turner v. Louisiana, 379 US 466, 472.

In this case, the alleged confession of Irwin was taken in the absence of Amsler with no chance of cross-examining it.

In the Aranda case, supra, the court held that where the prosecution proposes to introduce into evidence an extrajudicial statement of one defendant that implicates a codefendant, the trial court must adopt one of the following procedures: it can only permit a joint trial if all the parts of the extrajudicial statement implicating any codefendant can be effectively deleted without prejudice to the declarant; or it can grant a severance of the trials.

Neither was had in this case. We respectfully submit that the denial of the severance was highly prejudicial to the appellant Amsler.

THE MONEY

In connection with the matter of cross-examination, we were entitled to see what purported to be the money. The government did not have to destroy it before trial. It could have been as easily destroyed after trial and after defense counsel had a chance to see it and count it and see whether it was or was not, in fact, as purported to be and to investigate its source and purpose.

This we were denied.

ADOPTION OF POINTS

In respect to the matters raised by the appellant Irwin as to the misuse of the telephones and other points, we adopt the same on behalf of the appellant Amsler as our own and urge the Court to reverse on each of the grounds therein set forth.

CONCLUSION

For each and all of the errors set forth herein and in our opening brief, appellant Amsler respectfully prays for reversal of the judgments.

Respectfully submitted,

MORRIS LAVINE

Attorney for Appellant Amsler

NO. 19,702

See also Vol. 3333

UNITED STATES

COURT OF APPEALS

for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

SECURITY PLATING COMPANY, INC.,

Respondent.

On Petition for Enforcement of an Order

of the National Labor Relation Board

PETITION FOR REHEARING

RICHARD A. PERKINS
202 South Hamilton Drive
Beverly Hills, California

Attorney for Respondent

NO. 19,702

UNITED STATES

COURT OF APPEALS

for the Ninth Circuit

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RICHARD A. PERKINS
202 South Hamilton Drive
Beverly Hills, California

Attorney for Respondent

TOPICAL INDEX

TABLE OF AUTHORITIES

(CASES CITED)

PETITION FOR REHEARING

Respondent respectfully petitions for rehearing. This petition deals only with the Labor Board's finding of unlawful refusal to bargain collectively and its order requiring respondent to bargain with the Union as exclusive representative of employees.

1. The Lack of Evidentiary Support for the Union's Majority Claim: The Union had a paper showing of majority based on "authorization" cards. At best, such cards are less reliable than an election as a means of ascertaining employees' wishes. 1/ In this case, as the opinion of February 15, 1966, states, the cards "were in English, a language which /many of those who signed/ were unable to read." In these circumstances the cards did not have even presumptive validity, and it became important to find out what employees were told about the cards when they signed.

As the February 15, 1966, opinion noted, there was evidence to the effect "that the Union organizer misrepresented the cards as simply a necessary preliminary to an election." Cards signed on the representation that they are "just for an election" should not be counted in support of a union's claim of majority: N. L. R. B. v. Koehler (C. A. 7) 328 F. 2d 770.

The opinion of February 15, 1966, also states: "However, there was also evidence that the meaning and import of the cards were carefully and correctly read and explained to such employees in a language that they understood." This evidently refers to the testimony of the Union organizer

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1/ N. L. R. B. v. Johnnie's Poultry Co. (C. A. 8) 344 F. 2d 617, quoting the Board Chairman for statistics showing that unions with a paper majority based on cards are often rejected by employees when they are permitted to vote under the protection of a secret ballot.

Lopez, who testified: "We read off the card and explained to them thoroughly what these cards meant." (Tr. 323.) This was merely his conclusion, worthless as evidence. Continuing with his version of what he had told employees, Lopez testified: "Only two people see these cards. That is the person that signs it and the union when they receive it. After that when we have the sufficient number we can file for a representation with the Board. We turn them into the Board and they see them, but these cards are totally secret." (Tr. 323.) This evidence is consistent with the testimoney given by respondent's witness Valenzuela to the effect that Lopez told employees the cards were "just for an election" (Tr. 245.) Neither Lopez nor anyone else denied the statement attributed to him by Valenzuela. If, as Lopez said, the cards were to be shown only to the Board, then their only purpose was to bring about an election. (The Board requires the confidential disclosure of a 30% prima facie showing on cards in order to process an election petition.)

On the evidence, it is clear that many employees were told that the cards were "just for an election." In these circumstances the cards did not constitute substantial evidence in support of the Union's majority claim.

2. <u>The Reasonableness of Respondent's Doubt of the Union's Majority Claim:</u> If it is assumed (without substantial evidentiary support) that the Union had a majority, the next question is whether that was brought home to respondent in any way so as to invoke the duty to bargain. The Board did not hold an election, and no cards were shown or even offered to respondent moreover, under the promise of secrecy which the Union made to the card-

signers, the cards would not have been shown to the respondent if it had asked for them. According to the Board the respondent was obliged to bargain with the Union as majority representative without any showing of representation or offer of any such showing, and even though notice of the Union's election petition reached respondent before the Union's bargaining demand.

The Board concedes that good faith doubt of a union's majority claim excuses an employer from bargaining with a union, regardless of its majority status. But the Board customarily finds (as it did here) that the employer did not have a good faith doubt because he had done something or other which the Board is able (as it usually is) to find an "unfair labor practice." That is absurd. Whatever one's conduct may be, he may have a good faith doubt based on the available information, or lack of it. To deprive an employer of the benefit of a good faith doubt because he has committed an "unfair labor practice" is simply punitive, without any rational basis. 2 /

As noted in the opinion of February 15, 1966, the facts of N. L. R. B. v. Dan River Mills (C. A. 5) 274 F. 2d 381, are similar to those of the instant case. But the result announced in the instant case is just the opposite of the result in the Dan River Mills case. The difference is said

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2 / N. L. R. B. v. Overnite Transportation Co. (C. A. 4) 308 F. 2d 279, 28 may be read for the proposition that an employer who opposes union organization of his employees thereby admits the truth of a union's majority claim. If so, then with all respect we suggest that the notion ought to be entered for the non-sequitur prize. On that theory, if A says to B, "I can whip you," then if B puts up his dukes he thereby admits that A can whip

to lie in "controlling facts" present in the Dan River Mills case, namely, that in that case " 'the employer immediately... disputed /the union's majority status/' by expressly stating its doubt in a letter to the Union and the Board." But in the Dan River Mills case the employer was replying to a union letter which had proposed a card check and other alternative methods of verifying the union's majority claim. In the instant case, however, the union made no such proposal; it merely demanded recognition. And the intervening notice of the filing of the election petition anticipated the employer's doubt and indicated that an election (as the only procedure proposed by anyone) was being sought to resolve it; accordingly, no reply was called for. As in the Dan River Mills case, the previous notice of the filing of the petition made it "reasonable for the Employer to assume that the law would resolve his good faith doubt concerning the Union's majority by the election requested..." We respectfully suggest that in the Dan River Mills case the employer's self-serving letter was not a "controlling factor, nor should it have been. (If the respondent here had been represented by counsel earlier such a self-serving letter would probably have been sent, but it would have made no difference at all to the Union or the Board.)

In these circumstances the respondent ought not to be penalized because it did not ask the Union to prove its claimed majority by some means other than the election for which the Union had petitioned even before its bargaining demand reached the respondent. 3/ In any event the

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3/ N. L. R. B. v. Downtown Bakery Co. (C. A. 6) 330 F. 2d 921: "In its briefs the Board emphasizes the fact that the respondent did not request /the union/ to prove its majority status. In Stoner Rubber Co., Inc., 123 NLRB 1440, the Board correctly notes that 'proof of majority status is peculiarly within the special competence of the union.' It would seem then that the burden of coming forward with proof of its alleged majority status was upon the union. The employer... in these circumstances should not be held accountable for its failure to request of /the union/ proof of its claimed majority status."

omission of the respondent in this case to demand proof of the Union (said to distinguish this case from Edward Field, Inc. v. N. L. R. B. (C. A. 2) 325 F. 2d 754) meant nothing in the circumstances of this case, for the Union had promised card-signers that the cards would be seen only by the Union and the Board; otherwise, they would be kept "totally secret" (Tr.323. Accordingly, if the respondent had demanded proof none would have been furnished. The respondent ought not to be penalized because it did not make a futile demand. The law does not require idle acts: Calif. Civil Code, Sec. 3532. And in situations where a demand would ordinarily be required, it is unnecessary if it would be futile: Cook v. Snyder, 16 Cal. App. 2d 587 61 P. 2d 53. (California authorities are citedhere because of their accessibility; as State law of course they are not binding on this Court, but their good sense transcends the Federal supremacy.)

Conclusion: The Board's finding of unlawful refusal to bargain and its bargaining order are not supported by substantial evidence on the record considered as a whole, according to the standard of review prescribed by the statute (Sec. 10(c),) as authoritatively interpreted: N. L. R. B. v. Universal Camera Co., 340 U. S. 474. This petition for rehearing should therefore be granted and the Board's bargaining order should be set aside.

Respectfully submitted,

Richard A. Perkins

RICHARD A. PERKINS
Attorney for Respondent

Certificate of Counsel

In my judgment the foregoing Petition for Rehearing is well founded and it is not interposed for delay.

Richard A. Perkins

RICHARD A. PERKINS,
Attorney for Respondent.

No. 19,725

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

WESTERN LIGHTING CORP.,

Appellant,

vs.

SMOOT-HOLMAN,

Appellee.

Petition for Rehearing on Behalf of Appellant, Western Lighting Corp.

HERZIG, WALSH & BLACKHAM,
9465 Wilshire Boulevard,
Beverly Hills, Calif. 90202,
Attorneys for Appellant.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

TOPICAL INDEX

TABLE OF AUTHORITIES CITED

No. 19,725

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FOR THE NINTH CIRCUIT

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Appellant,

vs.

SMOOT-HOLMAN,

Appellee.

Petition for Rehearing on Behalf of Appellant, Western Lighting Corp.

To the Honorable Ben C. Duniway; Walter Ely, Circuit Judges of the United States Court of Appeals for the Ninth Circuit and Walter E. Craig, District Judge:

The appellant above-named aggrieved by the opinion filed in this court on December 7, 1966, comes now and respectfully petitions for a rehearing relative to the questions presented herein.

1. Page 2 of the opinion,—there were *not* "several awards."

2. At page 3, Finding of Fact 15 *was* contested. (Pages 3 and 4 Reply Brief.)

3. At page 3—the *record* has no bearing on invalidity under Sec. 112. The undefined "relatively narrow," and undefined *spacing, per se,* render the claims invalid, particularly where plaintiff *apparently relies on these things for patentability.*

The Fixture of Finding of Fact 11 Was Not Experimental.

No witness testified that the display fixture of Finding of Fact 11 was experimental. Plaintiff assumed no such burden at all.

There are no *Findings* of Fact supporting the conclusion that said display was experimental.

At the bottom of page 2, of this Court's opinion, the law of the case of *Amerio Contact Plate Freezers v. Belt-Ice Corporation*, 316 F. 2d 459, is wrongly applied. It is clear from the evidence, that the display fixture in the offices of Smoot and Holman satisfies the requirements of this case, as stated at page 465, as follows:

> "Ordinarily, however, selling activity (at least activity short of actual sales) prior to the time that a *fully operative article or apparatus incorporating the invention comes into existence*, it is not a reliable indicium of competitive exploitation. Until at least *an operative prototype has been completed and tested*, the competitive effectiveness of such activity, in all probability, will be impaired by the aura of continuing developmental, experimental and testing effort." (Italics added).

It is respectfully, but emphatically submitted, that the evidence leaves no doubt that the display installation in the offices of Smoot and Holman was a *fully operative and successful prototype*.

The design work done on the large installation at Air Research by Bill Jones and the installation in the Photometric Lab obviously do not make the display installation of Finding of Fact 11 experimental. The case of *Tucker & Aluminum Products, Inc. v. Grossman*, 312 F. 2d 293, CA 9, January 9, 1963, is cited

in the opinion, but in this case the *defense of prior public use was held to be good,* the Court stating, "further the contentions of plaintiff pertaining to testing and experimentations are without merit."

This Court's Decision Is Incorrect Because the Findings of Fact Are Spurious and Insufficient and Cannot Support the Holding of Validity; What Is Found to Be Patentable Is Not in the Claims; the Claims Are Obvious in View of the Prior Art.

Finding of Fact number 61 found the combination of features to be a new element comprising:

a. relatively long narrow lamp housings generally rectangular in cross section;

b. open at the top and bottom with opaque sides,

c. containing wireways;

d. to be engaged end-to-end with the wireways aligned and connected.

No Claim in Suit Contains This Combination of Features.

Claim 1 is *not limited to a relatively narrow fixture*; it is limited only to narrow vertical *outer* side members; it is a fixture of *any* width. It is *NOT* open at the top and bottom.

Claims 9 and 10 do not include any wireways at all; there are no inner side walls. The *sides* of claim 10 are not vertical.

Claim 12 is NOT limited to a narrow clamp housing. This claim is simply two housings end-to-end. The housing side walls are *parallel, not vertical.*

The record shows that the trial judge, at the end of the trial, did not know what was offered as new or relied upon which amounts to invention. The trial court and this court have been mislead. *The question still remains unanswered:*

It is necessary that findings show *what is patentable over the prior art.*

Yavitch v. Seewack, 323 F.2d 561; CA 9, 1963.

Even the spurious Findings of Fact on record in the case at bar do not state what is different over the prior art.

Findings of Fact numbers 59 and 60 in the case at bar relating to a patentable combination are mere conclusions of law and cannot support the court's decision.

See *Welsh Co. of California v. Strollee of California,* CA 9, April 28, 1961. 290 F. 2d 509.

The above case was again brought before this court at 313 F.2d 923, February 14, 1963 and the patent was held invalid just as should be done in the case at bar.

Findings must be detailed and complete in respect to prior art, time of invention, the existence of competing machines, nature of competing machines and comparision of functions, in short, novelty, utility and invention. There is absolutely no support in the Findings or elsewhere for the conclusion in Finding 11 that the display fixture was "experimental."

See,

Kaakinen et al v. Peelers Co., CA 9, *133 USPQ 298* April 10, 1962.

How can the alleged advantages of Finding 15 flow from the claims upon honestly acknowledging what is *NOT* in them!

Claim 9 does not *exclude* a longitudinal wire way and ballast support between the housings.

Considering claims 1, 9, 10 and 12 rather than the *spurious* Finding 61, they are *obvious* as follows.

Claim 12 (Ex. B1)—Beck patent No. 2,312,617 Ex. P. British patent No. 570,042 Ex. N.

Claim 1 (Ex. BE)—Same, plus Strang patent No. 2,090,239 Ex. AO (alone or combined)

Claim 10 (Ex. BH)—Kantack patent No. 2,306,-700 Ex. AQ. Ainsworth design patent No. 169,999 Ex. Q with Architectural Forum Ex. AL. Ruby Lighting Fixture Ex. Y and Ex. X (p. 3) in view of Exs. AQ and Q.

Claim 9 (Ex. BF)—Same as claim 10, Ex. Y taken alone. (Ex. X (page 3)) is a photograph of this fixture.

The claims are invalid under Sec. 112.

> *Schriber-Schroth Co. v. Cleveland Trust Co.*, 305 U.S. 46;
>
> *General Electric Co. v. Wabash Appliance Corp.*, 304 U.S. 364;
>
> *United Carbon Co. v. Binney & Smith Co.*, 317 U.S. 228.

Note that in the *General Electric* case "comparatively large" was condemned on certiorari to this Court with respect to lamp filament granules. In the *United Carbon* case "comparatively small" was condemned.

It is strongly urged that a rehearing be granted in this case.

Herzig, Walsh & Blackham,
By Edward C. Walsh,
Attorneys for Appellant.

Certificate.

I hereby certify that in my judgment the petition for rehearing is well founded and further certify that it is not interposed for delay.

EDWARD C. WALSH,
Attorney for Appellant.

Nos. 19745, 19761, and 21099

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

No. 19745

ELY VALLEY MINES, INC., PIOCHE MINES CONSOLIDATED, INC., and JOHN JANNEY,

Appellants,

vs.

LAWRENCE RUST LEE, HELEN DOLMAN, E.P.R. DUVAL, KATHERINE HANSBROUGH and JAMES KEITH MARSHALL, JR.,

Appellees.

No. 19761 and No. 21099

ELY VALLEY MINES, INC., PIOCHE MINES CONSOLIDATED, INC., and JOHN JANNEY,

Appellants,

vs.

AMERICO L. CAMPINI, SULLIVAN, ROCHE, JOHNSON and FARRAHER, THEODORE A. KALB, GERALD J. O'CONNOR, JAMES FARRAHER and ROGER T. FOLEY,

Appellees.

APPELLANTS' OPENING BRIEF.

MORSE & GRAVES,
116 South Fourth Street,
Las Vegas, Nevada,

JOHN PETER LEE,
310 South Third Street,
Las Vegas, Nevada,

Attorneys for Appellants, Pioche Mines Consolidated, Inc., Ely Valley Mines, Inc. and John Janney.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

SUBJECT INDEX

TABLE OF AUTHORITIES CITED

Cases

Rules

Statutes

Nos. 19745, 19761, and 21099

IN THE

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No. 19745

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Appellees.

APPELLANTS' OPENING BRIEF.

Jurisdiction.

Jurisdiction of this action is based solely upon United States Code Annotated, Title 28, Section 1332:

> "The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between:
>
> "(1) Citizens of different states . . ."

28 United States Code Annotated, Section 1332.

The amended complaint sets forth that appellee Helen Dolman is a resident and citizen of the State of California; that appellee Lawrence Rust Lee is a resident and citizen of the State of Virginia; that appellee E.P.R. Duval is a resident and citizen of the State of Arkansas; appellee James Keith Marshall, Jr. is a resident and citizen of the State of Virginia and appellee Katherine Hansbrough is a resident and citizen of the State of Virginia. Said amended complaint further alleges that defendants Ely Valley Mines, Inc., a corporation, defendant Pioche Mines Consolidated, Inc., a corporation, and John Janney, are Nevada corporations and residents, respectively.

The amended complaint further avers that the corporate properties of Ely Valley Mines, Inc. have a value in excess of $2,000,000.00 and seeks damages of $1,000,000.00 against John Janney.[1]

After No. 311 was at issue on the original complaint, appellee Helen Dolman was granted leave to amend her complaint. The order granting said leave was filed in the District Court on June 6, 1961. No responsive pleadings were filed to the amended complaint until after the decision in appeal No. 17,709 was rendered. The answer and counterclaims of Ely Valley and Pioche Mines were filed August 21, 1964 [Tr. 91]. Upon oral motion, the District Court ordered, on August 25, 1964, that the answer and counterclaim be stricken. The appeal from this order is No. 19745.

On October 5, 1964 Notice of Appeal was filed from a Restraining Order issued against John Janney. This

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[1]This Court in appeal No. 17,709, cited as 337 F. 2d 257, (1964), awarded Pioche Mines Consolidated judgment in the amount of $1,000,000.00 against John Janney. This appeal arises out of the same action, No. 311 in the District Court of the State of Nevada.

is appeal No. 19761. Appellate jurisdiction for an appeal from this Order is granted by *United States Code Annotated, Section 1292(a)(1).*

On November 23, 1964, there was filed "Judgment and Orders After Appeal." The same were docketed on November 30, 1964. A Motion to Alter or Amend the above order was docketed on December 7, 1964. This motion was denied on June 25, 1965, on the grounds that the motion was not timely filed. Notice of appeal from this order was docketed on the 28th day of June, 1965. Jurisdiction to hear this appeal is granted by *28 United States Code Annotated, Section 1291.* This is appeal No. 21099.

On January 11, 1965 Ely Valley Mines filed its Motion to Re-Tax Costs. On June 21, 1965 the motion was denied. Notice of appeal from the order of denial was filed on June 28, 1965. Jurisdiction to entertain this appeal is granted by *28 United States Code Annotated, Section 1291.* This is also appeal No. 21099.

On the 28th day of December, 1964 this Court ordered that all of the appeals be consolidated for the purposes of briefing and argument. On the 10th day of August, 1966 this Court denied appellees' motion to dismiss. Therefore, this Court has jurisdiction.

Statement of the Case.

The four appeals herein consolidated all arise out of proceedings taken in the United States District Court for the District of Nevada subsequent to this Court's decision and mandate rendered in Case No. 17,709; 337 F. 2d 257 (1964). The Court, in No. 17,709 (333 F. 2d at 276), made a twelve-paragraph order and remanded the matter to the trial court with directions (337 F. 2d 257, 277, 278). Appellants take issue with

various rulings made by the trial court in its attempt to carry out the mandate of this Court.

This case involves properties which at the time of the filing of the original complaint on February 2, 1960, were alleged to be worth a sum in excess of $2,-000,000.00 [Tr. 41, No. 17,709], and although six years have elapsed during which time "a veritable blizzard of motions and papers" has plagued the Court (333 F. 2d 257, 260), the property still lies dormant and unproductive to the detriment of all parties directly involved in the litigation; to the economic loss of the residents of the geographical region wherein the mines are situate; and, to say the least, to the understandable vexation and test of patience borne by the judiciary.

Without seeking to cast blame on the one hand, or to stand before the Court in a posture of abject apology on the other, but rather in an unemotional, legalistic and objective attempt to be of assistance in settling the law and facts of this issue, appellants show unto the Court as follows:

The four appeals, for the sake of both brevity and convenience, will be denominated by the following appellations, and will be taken up in the order of their nomenclature, rather than in the order of their dates in the Civil Docket or in the order of importance to which appellants might subscribe to them:

1. The Order Striking the Answers and Counterclaims;
2. The Restraining Order;
3. The Order Denying the Motion to Alter or Amend;
4. Ely Valley's costs.

I.

The Order Striking the Answers and Counterclaims.

This Court in *Pioche Mines Consolidated, Inc. v. Dolman,* 333 F. 2d 257, at page 277, in paragraph 4, directed that "the order entering the defaults of those two corporations and striking their pleadings is reversed. The court is directed to reinstate their counterclaims". The mandate [Tr. 3] directed:

> "The judgment against Pioche Mines Consolidated, Inc. and Ely Valley Mines, Inc. is reversed. The order entering the defaults of these two corporations is reversed. The court is directed to reinstate their counterclaims."

The trial court's order in this regard read as follows:

> "2. That that part of said judgment heretofore entered by this Court on October 8, 1962, against Pioche Mines Consolidated, Inc. and Ely Valley Mines, Inc. is hereby vacated and set aside, and the counterclaims filed on April 4, 1960, on behalf of said corporations be, and the same hereby are reinstated."

It is to be noted that at the time of the appeal in No. 17,709, *Pioche Mines Consolidated v. Dolman (supra),* the basic pleadings on file were the complaint, answer and counterclaims on behalf of Pioche Mines Consolidated, Inc. and Ely Valley Mines, Inc.; answer and counterclaim on behalf of John Janney; Reply by Plaintiff Helen Dolman; and an amended complaint on behalf of Helen Dolman, Lawrence Rust Lee, *et al. There was no answer on file in response to the amended complaint* (italics added), and none has been allowed because the lower court struck the answers to the amended

complaint and the counterclaims of the defendants which accompanied the answers [Tr. 126]. This action by the trial court was done pursuant to an *ex parte* oral motion by appellees (Civ. Docket 18), thirteen days after the Circuit Court of Appeals Judgment was filed, which was August 11, 1964.

On August 25, 1964, the civil docket (p. 18) reflects the following proceedings: "With Mr. Horton seated in the rear of the courtroom, and Mr. Janney at counsel table, the Court states that it wants to reconsider the motion of Mr. O'Connor to strike the Answer of Defendants to amended complaint and counterclaims filed August 21, 1964. Mr. O'Connor restates his motion to strike previously made yesterday and the grounds therefor. The Court reviews the motion and various citations and reaffirms the order made yesterday striking the aforesaid answer and counterclaims. Mr. O'Connor presents a written order which is signed and filed."

The written order [Tr. 126] adopted as a basis for dismissing the answer, as distinguished from the counterclaims, the following two grounds [Tr. 126]:

> "1. That there is no order of this court permitting the filing of such document and that such document may not be filed without such order;
>
> "2. That there is no motion before this court to permit the filing of such document;"

The remaining nine grounds for the dismissal have only to do with the counterclaims in response to the amended complaint, and appellants concede that the motions to dismiss the counterclaims have merit and therefore abandon the counterclaims on this appeal. However, appellants submit that the answers themselves

were stricken without legal justification and appellants do urgently seek a reversal as to that portion of the lower court's order. Upon reversal the original counterclaims will stand submitted and the case will be at issue, ready for trial setting.

II.

The Restraining Order.

In *Pioche Mines Consolidated, Inc. v. Dolman,* 333 F. 2d 257, at 277, this Court ordered the trial court:

> "To vacate the appointment of the receiver, require him to account, settle his accounts in the manner herein approved, charge expenses of the receivership against such parties as may be appropriate under the principles stated in this opinion, require the receiver to deliver the respective properties, books, files, records and accounts of Pioche Mines Consolidated, Inc. to them, and upon the settlement of his accounts and the completion of his duties discharge him."

In 13(b), page 277, this Court further ordered:

> ". . . That the action be dismissed as against Ely Valley Mines, Inc. . . ."

Paragraph 5, page 277, states:

> "The orders of December 16, 1961, January 24, 1962 and March 16, 1962, and the judgment, insofar as they direct the appointment of, or appoint the receiver, are reversed."

As previously noted, the above judgment was docketed in the District Court and counsel was so notified on the 11th day of August, 1964 (Civ. Docket 17).

Despite the plain and explicit wording of the above orders, the receiver filed on September 3, 1964 as affidavit, to the effect that he was performing certain assessment work on the mines and that John Janney and his agents were attempting to seize possession of the mining claims owned by the two appellant corporations. Based upon this affidavit the court ordered on September 3, 1964, that John Janney, and his agents, be restrained from attempting to occupy, possess, or in any way exert dominion or control over the properties of Pioche Mines Consolidated, Inc. and Ely Valley Mines, Inc. This order was made *ex parte*. Appellants contend that the court abused its discretion in issuing a restraining order without notice and in disregard of this Court's mandate.

III.

The Order Denying the Motion to Alter or Amend the Judgment.

The trial court entered its Judgment and Orders After Appeal on November 20, 1964. It was docketed November 30, 1964 (Civ. Docket 22). A reading of the Civil Docket fails to show that a Notice of Entry of Judgment was served on appellant or their counsel. On December 7, 1964 appellants filed their Motion to Alter or Amend Judgment. The motion was denied on June 23, 1965. The Court found:

> "That the Judgment and Order After Appeal was made and entered on November 23, 1964; this court further finds that, the said Motion to Alter or Amend Judgment was filed herein December 7, 1964; this court further finds that, pursuant to Rule 59 of the Federal Rules of Civil Procedure,

said Motion to Alter or Amend Judgment was required to be filed within ten (10) days from date of entry of said order.

"It Is, Therefore, Ordered, that the said Motion to Alter or Amend Judgment be, and the same is, hereby denied upon the ground that the said Motion was not timely served and filed."

The question presented, therefore, is whether or not time starts to run from the date of filing or the date of docketing. In other words, is the date of entry the date of filing or is it the date of notation in the Civil Docket?

IV.

Ely Valley's Costs.

On January 6, 1965 Ely Valley Mines filed its Memorandum of Costs and Disbursements in the sum of $5,324.86. The clerk of the court, on January 6, 1965, taxed them at the figure set forth in the memorandum. On the same day appellees filed their objections to the cost bill, and on January 11, 1965 filed a motion to retax costs. On June 23, 1965 the cost bill was denied, the court finding and ordering:

"that the judgment authorizing recovery of costs was made and entered on November 23, 1964, in that certain order entitled 'Judgment and Orders After Appeal';

"This Court Further Finds that, pursuant to Rule 18(a) of the Rules of Practice of the United States District Court for the District of Nevada, said Memorandum of Ely Valley Mines, Inc., Of Costs and Disbursements was required to be filed in no event more than five (5) days *after notice of entry of decree.*" (Italics ours).

> "*This Court Further Finds that notice of entry of said decree was given no later than November 30, 1964.*" (Italics ours).
>
> "IT IS, THEREFORE, ORDERED that said Memorandum of Ely Valley Mines, Inc., Of Costs and Disbursements be, and the same is, hereby denied upon the ground that the same was not timely served and filed. The Clerk of this Court is directed to enter an order denying recovery of such costs."

Rule 18(a) of the Rules of Practice, United States District Court for the District of Nevada, does indeed state, as found by the Court:

> "The party in whose favor a judgment or decree for costs is awarded or allowed by law, and who claims his costs, shall, after verdict, or after the making of an order for judgment or decree, serve on the attorney for the adverse party and file with the clerk (such service and filing in no event to be later than five days *after notice of the entry of the decree or judgment*) his bill of costs and disbursements, . . ." (italics ours).

Appellants quarrel with the finding that "Notice of Entry of Judgment was given no later than November 30, 1964." As the record shows, this Order was prepared in the office of Alvin N. Wartman, Attorney at Law, Suite 10, Cornet Building, 401 Fremont Street, Las Vegas, Nevada. The Civil Docket is devoid of a notation showing entry and service of any Notice of Entry of Judgment. Therefore, the question to be decided is whether or not a Notice of Entry of Judgment was filed

and served, and, if not, when does time for filing a cost bill begin to run. While this point might be classed as a technical one, yet a reading of all the various post judgment motions and objections filed by appellees cannot but leave the reader with the inescapable conclusion that a course of purposeful delay and obstruction has been pursued by appellees in the form of raising every conceivable objection to the carrying out of this Court's mandate. Hence, appellants trust they will be forgiven for requesting this Court to require appellees to adhere to the strict letter of the rules as well as to invoke them. In short, "he who lives by the sword shall die by the sword."

Statement of Facts.

The questions presented, as the reader has already undoubtedly gathered, relate almost exclusively to procedural matters, and, therefore, a statement of facts is really not essential to an understanding of this appeal. The facts underlying the case in chief are lengthy and complex and will in all probability be before this court at some future date. Until that time, it behooves appellants to spare the Court the burdensome task of wading through the reams of material involved in this case and its companion.

Suffice it to say that the action was instituted in the year of 1940 by Appellee, Helen Dolman, who alleged that she was bringing the action for herself as an individual and as a stockholder of appellant corporations. This pleading was found defective and was amended by the insertion of additional named parties plaintiff. Prior

to the filing of answers to the amended complaint, default judgment was entered, and an appeal was taken therefrom which is No. 17,709, *Pioche Mines Consolidated, Inc. v. Dolman*, 333 F. 2d 257 (1964). The matters before the Court on this appeal all stem from differences arising from the interpretations placed on that decision by the various parties, and their attempts to carry out its provisions, the pertinent portions of which are as follows:

1. Appeal No. 1, of November 6, 1961, appeal No. 2, of December 18, 1961, appeal No. 3, of January 4, 1962, and appeal No. 4 of February 5, 1962, are dismissed.
2. Insofar as the judgment awards $1,000,000.00 and costs against John Janney, it is affirmed; insofar as that judgment is in favor of the receiver, it is reversed, and the court is directed to substitute Pioche Mines Consolidated, Inc. a corporation, as the party in whose favor that part of the judgment is entered.
3. The judgment against Pioche Mines Consolidated, Inc. and Ely Valley Mines, Inc. is reversed.
4. The order entering the defaults of those two corporations and striking their pleadings is reversed. The court is directed to reinstate their counterclaims.
5. The orders of December 16, 1961, January 24, 1962, and March 16, 1962, and the judgment, insofar as they direct the appointment of, or appoint the receiver, are reversed.
6. The orders of December 6, 1961, January 24, 1962, and March 16, 1962, insofar as they contain injunctive provisions, are reversed.

7. The judgment, insofar as it contains injunctive provisions against anyone other than appellant John Janney, his agents, servants, or employees, is reversed.

8. That part of the judgment which restrains John Janney from disposing of or otherwise hypothecating his stock in Pioche Mines Consolidated, Inc., Ely Valley Mines, Inc., and Pioche Power & Light Company, is reversed.

9. That part of the judgment which restrains John Janney and his agents from disposing of, transferring or removing any of the assets, properties, books, files, records and accounts of Pioche Mines Consolidated, Inc. or of Ely Valley Mines, Inc., is affirmed.

10. Subparagraph 1 and 2 of paragraph VIII of the judgment are reversed. Subparagraphs 3, 4, 5 and 6 of paragraph VIII are reversed and remanded. The court is directed to determine what portion of the services of the firm of Sullivan, Roche, Johnson & Farraher and Gerald O'Connor, Esq., and of Alvin N. Wartman, Esq., were rendered on and after June 6, 1961, and award to the firm a judgment for a corresponding portion of the sum of $200,000 and to Alvin N. Wartman a judgment for a corresponding fraction of $18,529.19, such judgments to be payable only out of the $1,000,000 recovered by Pioche from Janney, and only from sums actually collected in the proportion that the sums awarded to such attorneys, respectively, bear to the total recovery adjudged due to Pioche from Janney.

11. Plaintiffs may recover their taxable costs in the trial court from appellant John Janney, but no other costs or expenses.

12. The orders of March 20, 1962, and of May 24, 1962, instructing the receiver, are vacated.

13. The matter is remanded to the trial court with directions

    a. To modify the judgment in the manner hereinabove ordered.

    b. To enter a judgment that plaintiffs take nothing against Ely Valley Mines, Inc., or on its behalf, other than the portion of the injunction awarded against John Janney personally that is hereby affirmed, that the action be dismissed as against Ely Valley Mines, Inc., and that it recover its taxable costs in the trial court against plaintiffs.

    c. To vacate the appointment of the receiver, require him to account, settle his accounts in the manner herein approved, charge expenses of the receivership against such parties as may be appropriate under the principles stated in this opinion, require the receiver to deliver the respective properties, books, files, records and accounts of Pioche Mines Consolidated, Inc. and Ely Valley Mines, Inc., to them, and upon the settlement of his accounts and the completion of his duties, discharge him.

    d. To take all other actions necessary to carry out the foregoing orders, and such further proceedings as shall be consistent with this opinion.

14. Appellees are awarded one-half of their costs on appeal against appellant John Janney; otherwise, each party shall bear his, her, or its own costs on appeal.

Specifications of Error Upon Which Appellants Rely.

1. The Order Striking the Answer was in Error because:

(a) The Mandate of the Court of Appeals set aside the default of the corporations, thereby permitting the filing of a responsive pleading.

(b) Where dismissal is granted, it should be with leave to amend.

(c) The Court must allow an answer to be filed, if it is responsive and within the rules.

(d) The defense that the complaint fails to state a claim upon which relief can be granted may be interposed by answer with equal validity and effect as if made by motion and must be heard.

2. The Court Erred in Allowing the Restraining Order of September 3, 1964.

(a) The Court allowed injunctive relief at the prayer of a person no longer a party to the proceedings.

(b) No Notice was given.

(c) There was no showing of great, lasting, or irreparable injury.

(d) The Court failed to follow the plain dictates of Rule 65 Federal Rules of Civil Procedure.

3. The Court Erred in Denying the Appellants Motion to Alter or Amend the Judgment filed December 7, 1964.

(a) The Court erred in finding that the time for filing the motion commenced to run on November 23, 1964.

(b) The Court should have found that the time for filing the motion commenced to run from the date the motion was noted in the Civil Trial Docket, namely, November 30, 1964.

4. The Court Erred in denying Ely Valley Mines' cost bill.

(a) The plain wording of Rule 18(a) of the Rules of Practice, United States District Court For The District of Nevada, allows the cost bill to be filed five (5) days after notice of entry of judgment.

(b) The Court erred in finding that "Notice of Entry of Judgment was given no later than November 30, 1964."

POINTS, AUTHORITIES AND ARGUMENT.

I.

The Order Striking the Answer and Counterclaims.

Appellants substituted counsel on this appeal, not having participated in the prior proceedings in this matter, is in somewhat the same position as the reviewing court in that he is afforded the opportunity to take a completely objective view of the case, and submit his brief on the matter unburdened by the subjective difficulties inherent in the conduct of all litigation. In this vein, and without in any way meaning an intendment of criticism against any person, appellants concede that the lower court was justified in striking the counterclaims. Those reinstated by the opinion of the Appellate Court raise issues upon which appellants can gain the relief they seek and all sufficient.

The motion to strike, while inappropriate, was properly treated as a motion to dismiss.

Federal Rules of Civil Procedure, Rule 12.

Where an answer as well as a reply have been served, a motion to strike can be considered as a motion to dismiss. *F. E. Myers & Bros. Co. v. Guilds Pumps,* (D.C.N.Y. 1946), 5 F.R.D. 132.

Granting the propriety of the lower court's action in dismissing the counterclaims, it did commit error in dismissing the answer. The answer [Tr. 91] consists of six stated defenses, among which, the fifth, is that the complaint fails to state a claim upon which relief can be granted. Taken as a whole, they controvert the allegations of the complaint, and are sufficient to put the case at issue.

Federal Rules of Civil Procedure, Rule 15(a).

Federal Rules of Civil Procedure, Rule 7 provides a simple and elastic procedure concerning pleadings without too much emphasis as to form. *Ranghley v. Pennsylvania R. Co.* (C.A. 3d, 1956), 230 F. 2d 387.

The purpose of pleading under the rules is to give notice of what an adverse party may expect to meet rather than to frame issues. *Kellogg Co. v. National Biscuit Co.* (D.C.N.J. 1941), 38 Fed. Supp. 643.

An answer is sufficient if it is definite enough to inform the adverse party of the issues be must be prepared to meet. *Fontes v. Porter* (C.C.A. 9th, 1946), 156 F. 2d 956.

A motion to strike will not be granted if the insufficiency of the defense is not clearly apparent or may better be determined upon a hearing on the merits. *Smith v. Piper Aircraft Corp.* (D.C. Pa. 1955), 18 F.R.D. 169, 177.

Striking a pleading is a drastic remedy to be resorted to only for purposes of justice, and should be sparingly used by a court. *Brown & Williamson Tobacco Corp. v. U. S.* (C.A. 6th), 201 F. 2d 819.

A motion to strike a defense for insufficiency should be granted, if at all, with leave to amend. *Morgan v. Duro Paper Bag Mfg. Co.* (D.C. Ind. 1957), 22 F.R.D. 598.

Appellants submit that in view of the foregoing authorities the learned trial Judge erred in striking appellants' answer.

II.

The Restraining Order.

The lower court issued a restraining order based upon the affidavit of the receiver and without notice. The court will recall that its decision in *Pioche Mines Consolidated (supra)* vacated the trial court's order appointing the receiver and dismissed the complaint as to Ely Valley Mines, Inc. The sole and remaining function of the receiver after the appellate court's decision was to render an accounting. He had no standing after the rendition of the decision to appear before the court, other than to account. He was totally and absolutely stripped of any authority to exercise any dominion or control over the corporations' properties, and this is especially true of Ely Valley Mines, Inc., because the action was dismissed as to it. Therefore, the receiver had no more business in seeking injunctive relief than a total stranger would have had.

The classic principles governing the availability of injunctions were clearly set forth as far back as 1830 in the case of *Bonaparte v. Camden,* C.C.N.J., Fed. Cas. No. 1617, and the principles therein set forth are as true and binding now as they were at that time:

> "There is no power the exercise of which is more delicate, which requires greater caution, deliberation, and sound discretion, or more dangerous in a doubtful case, than the issuing an injunction; it is the strong arm of equity, that never ought to be extended unless to cases of great injury, where courts of law cannot afford an adequate or commensurate

remedy in damages. The right must be clear, the injury impending or threatened, so as to be averted only by the protecting preventive process of injunction: but that will not be awarded in doubtful cases, or new ones, not coming within well established principles; for if it issues erroneously, an irreparable injury is inflicted, for which there can be no redress, it being the act of a court, not of the party who prays for it. It will be refused till the court are satisfied that the case before them is of a right about to be destroyed, irreparably injured, or great and lasting injury about to be done by an illegal act; in such a case the court owes it to its suitors and its own principles, to administer the only remedy which the law allows to prevent the commission of such act."

The word "notice" in Rule 65(a) implies the right to a hearing, and such a hearing usually will be required. *Sims v. Greene* (C.C.A. 3rd, 1947), 161 F. 2d 87.

While it could be successfully argued that the injunction expired within 10 days under *Federal Rules of Civil Procedure, Rule 65(6),* and the question is now moot, nevertheless appellants are entitled to have the record set straight in this particular. Expecially so, since the trial judge is apparently of a different opinion. Therefore, it is submitted that the matter be clarified so all concerned will be fully aware that Ely Valley Mines, Inc. is in the same position as if a claim had never been filed against it.

III.

Order Denying the Motion to Alter or Amend the Judgment.

It will be recalled that the trial court found that the Judgment was entered November 23, 1964, and therefore ruled that the Motion filed December 7, 1964 was untimely in that it did not meet the ten-day requirement of *Federal Rules of Civil Procedure, Rule 58.* However, counsel for Appellees who drew the Order entirely disregarded *Federal Rules of Civil Procedure, Rule 58,* That Rule specifically provides:

> "The notation of Judgment in the civil docket as provided by Rule 79(a) constitutes the entry of the judgment; and the judgment is not effective before such entry."

Therefore, it is plain to see that time did not start to run until November 30, 1964, which is the date of the notation of the order in the civil docket.

If a reading of the Rule is not sufficient to convince the Court on this point, the cases decided thereunder are as follows:

Greenwood v. Greenwood, 234 F. 2d 276, 278, which holds that pursuant to Rule 58, the notation of the Judgment on the docket as provided by Rule 79(a) constitutes the entry of the Judgment and the Judgment is not effective before that date.

See also: *Neely v. Merchants Trust Co. of Red Bank, N. J., et al.* (C.C.A. 3rd, 1940), in which the facts are as follows: A final decree was filed and marked filed on January 20, 1939. It was received by the Clerk either on January 21st or January 23rd, and was entered by a Deputy Clerk in the civil docket on January

23, 1939. The Court ruled specifically that the date of entry was January 23rd and not January 20th, and that the running of time commenced on the date that it was noted in the civil docket.

It is submitted that no further showing need be had to justify a reversal on this point.

IV.

Motion to Re-Tax Costs.

This Motion also was denied by the lower Court on the ground that it was not timely filed. This Court can very easily find and rule that the time for filing the cost bill is not governed by the same rules as are applicable to the filing of a cost bill after judgment or decree in the District Court. However, such a ruling is not necessary in the opinion of this writer because of the fact that no entry of judgment was entered herein and has not been entered as of the date of this brief. It is elementary that time does not start to run until the date of entry of Judgment.

> See *Federal Rules of Civil Procedure, Rule 73(a).*

Therefore, if this Court should decide to be literal on this point, it could in actuality rule that the time has not as yet commenced to run for the filing of the cost bill. However, it is submitted that such a strict interpretation of the rules is not at all necessary but on the other hand, there has been no prejudice to appellees whose duty it was to file the notice of entry and therefore they should not be held to complain on any technical ground, and that the cost bill should be determined on its merits, as should all the other matters herein on appeal.

Conclusion.

It is apparent to substituted chief counsel, after a prolonged search through the voluminous records in this case that tempers flared and emotions overcame reason, and understandably so. Having had a long and pleasant relationship with the learned trial judge, this counsel is of the certain opinion that had he had the temerity to file certain pleadings herein, both the Judge's wit and love of the law would have reasserted itself within time for rehearing. Unfortunately, however, counsel did not have the opportunity to correct these matters and regrets that this Court must be burdened to do so. Counsel is also certain that the learned trial judge is as anxious to have this matter heard on its merits as are appellants, and counsel can represent to this Court that as soon as is possible after the ruling herein to be handed down by this Court, that the matter will finally, after six long years, be heard on its merits and correctly determined.

Dated September 2, 1966.

Respectfully submitted,

John Peter Lee,
Morse & Graves,
Attorneys for Appellants, Pioche Mines Consolidated, Inc. and Ely Valley Mines, Inc. and John Janney.

Certificate.

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those Rules.

JOHN PETER LEE

Nos. 19,745, 19,761 and 21,099

IN THE

United States Court of Appeals

For the Ninth Circuit

ELY VALLEY MINES, INC., et al., *Appellants,* vs. LAWRENCE RUST LEE, et al., *Appellees.*	No. 19,745
ELY VALLEY MINES, INC., et al., *Appellants,* vs. AMERICO L. CAMPINI, et al., *Appellees.*	No. 19,761 and No. 21,099

APPELLEES' REPLY BRIEF

SULLIVAN, ROCHE, JOHNSON & FARRAHER,
ARTHUR H. CONNOLLY, JR.,
GERALD J. O'CONNOR,
220 Bush Street,
20th Floor, Mills Tower,
San Francisco, California 94104,
Attorneys for Appellees.

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Subject Index

Table of Authorities Cited

Cases

Rules

Nos. 19,745, 19,761 and 21,099

IN THE

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APPELLEES' REPLY BRIEF

I

INTRODUCTION

At the outset it should be noted that the designation of parties on this appeal, which appears on the cover of appellant's opening brief, is incorrect in several regards.

First, the appellant is John Janney; it is not Ely Valley Mines, Inc. and Pioche Mines Consolidated,

Inc. The said John Janney purports to speak for the said corporations, but he has no authority whatever to do so as is shown below. The said corporations are, at the present time, under the control of a receiver, although the trial court is presently in the process of settling the accounts of the said receiver, and will, upon completion, discharge him pursuant to the mandate of this court in its principal decision in this case, reported at 333 F. 2d 257.

The trial court has found, and it has become the law of the case, that these corporations have no valid boards of directors, and therefore, no valid officers. (See Finding 4, R. 1247 on previous appeal.)

This court, in its principal decision, affirmed the judgment against John Janney for his gross wrongs to the extent of one million dollars against the said corporations arising out of his one man control over them and affirmed the restraining orders the trial court entered against him, except as to certain personal assets not here involved.

See also the Petition for Rehearing purportedly filed in the same action in this court by the purported directors of the corporations, where they complain, at page 2:

> "The opinion of this Court, entered May 21, 1964, correctly removes the receiver of the Appellant corporations herein, but likewise restrains the corporate management from acting as legal agent for the corporations. This leaves the corporations, which must act through agents, without agents through which to act." (Emphasis added) (Note:

This document was stricken from the files of this court, and is referred to here only as an admission.)

Attention is also invited to the ruling of the trial court in its recent order striking a document purportedly filed by appellant Janney on behalf of the said corporations:

> "* * * the said document is purportedly filed on behalf of defendant corporations by defendant John Janney; that the said John Janney has heretofore been enjoined from acting on behalf of the said corporations, which said injunction has become final after appeal * * *." (Tr. 19745, p. 127.)

The clearest demonstration of the fact that appellant here is Janney rather than the corporations lies in the very first contention made by Janney on this appeal: namely, that the answers of the "corporations" to the complaint of Helen Dolman should be reinstated. Appellant thus suggests that the corporations do not care for the million dollar judgment in their favor and against John Janney, and wish to relitigate the merits of the questions already exhaustively passed upon by this court.

Such contention is obvious nonsense, and demonstrates forcibly that counsel for appellant Janney, while purporting to act for the said corporations, is in fact acting for the *sole benefit of* Janney and *against* the interests of the said corporations, and that the appellant here is Janney alone.

A second error in the designation of the parties on this appeal appears in the listing of the individuals on the cover of appellant's opening brief as appellees in Action Nos. 19761 and 21099. An attempt was made to bring in the said individuals as new parties by a new counterclaim. (Tr. 19745, page 91.) That counterclaim was stricken by the trial court and appellant has abandoned his appeal from the said order striking this counterclaim. (Opening Brief, page 6.) The said individuals are thus not parties to this lawsuit.

Also, by way of introduction, we must note that appellant's opening brief contains a great many recitations of purported fact without any citation whatever to the record, contrary to this court's rule 18 (2c). Many of these statements are either inaccurate or incorrect. Rather than recite the entire factual basis for the instant appeal correctly, at one time, we confine ourselves to correcting such misstatements as are pertinent to this appeal at appropriate points. By this we do not mean to imply that the remaining allegedly factual statements of appellants are correct; we simply do not wish to impose further on this court's patience.

II

ORDER STRIKING ANSWERS AND COUNTERCLAIMS

Under this heading, appellant John Janney argues that the trial court erred in striking the answer of Pioche Mines Consolidated, Inc. and Ely Valley Mines, Inc. The authorities cited (Opening Brief, pages 17-18) deal with the *adequacy* of pleadings.

Such authorities have nothing whatever to do with the instant appeal for the subject answer was stricken, not because it was inadequate, but simply because there was no basis for filing *any* answer. (Tr. 19745, page 126, lines 25-28; page 127, lines 17-25.)

This court, 333 F. 2d 257 at 277, directed that:

> "IV. The order entering the defaults of those two corporations and striking their pleadings is reversed. The court is directed to reinstate their *counterclaims.*" (Emphasis added.)

The trial court thereupon ordered:

> "That part of said judgment heretofore entered by this court on October 8, 1962 against Pioche Mines Consolidated, Inc. and Ely Valley Mines, Inc. is hereby vacated and set aside, and the counterclaims filed on April 4, 1960 on behalf of said corporations be, and the same hereby are reinstated." (Tr. 21099, page 149.)

It is difficult to see how the trial court could have followed the directions of this court more exactly!

Appellant Janney's argument actually is that *this* court's mandate was in error, that this court should have reinstated the answer as well as the counterclaim. Such contentions were disposed of by this

court when it rejected Janney's petition for rehearing, and by the Supreme Court, when it rejected Janney's Petition for Writ of Certiorari.

This court specifically ordered the default of the corporations set aside and directed that their *counterclaims* be reinstated. This court did *not* direct that the answer of the corporations be reinstated for obvious reasons i.e. such answer purportedly on behalf of the corporations, sought only to relitigate the wrongdoings of defendant Janney.

Appellant Janney, inadvertently we are sure, is in error in claiming that there was no answer by the corporation before the trial court at the time the principal appeal was determined. See 333 F. 2d at page 261, where this court specifically noted:

> "On April 4, 1960, the two corporations answered."

Appellant Janney's contention that the said answer was to the original complaint and not to the amended complaint is sheer sophistry. The two complaints were identical except that additional parties plaintiff appeared in the amended complaint in order to permit a more adequate representation by various stockholders. (Tr. 21099, pages 64-65.)

It is thus clear that the trial court was precisely correct in striking the answer filed by Janney purportedly for the corporations, and that the present appeal constitutes but a further example of the consummate effrontery of Janney in continuing to attempt to use the corporations for his own purposes.

III

THE RESTRAINING ORDER

Under this heading, appellant Janney, apparently, argues that the trial court erred in issuing its order on October 5, 1964, restraining *him,* directly or through his agents, from attempting to take over at that time, physical possession of the properties of the corporations. In support of his argument Janney cites (Opening Brief, pages 19-20) general law concerning preliminary injunctions.

The inappropriateness of such argument is clear.

The trial court had already entered its judgment after extended trial against John Janney, finding him guilty of extraordinary wrongdoings against the corporations, and restraining him from further control over the said corporations. These determinations and restraining orders against Janney were *affirmed* by this court on appeal in its principal decision at 333 F. 2d 257.

With consummate aplomb Janney thereafter attempted to physically retake the properties. (Tr. 19761, pages 6-7.) While contempt procedures might have been more appropriate, the extraordinary contention now made by Janney that the court had no power, without preliminary notice and hearing, to temporarily enjoin him hardly needs reply.

The contention is even more remarkable when it is noted that at the very time here involved, October, 1964, Janney was complaining to this court, in his Petition for Rehearing, after the principal decision

of this court affirming the judgment and restraining orders against him, as follows:

> "In addition both corporations have a substantial interest in continuing to enjoy the services of an honest, efficient and experienced President. *Their interests will be prejudiced if the judgment that deprives them of these services is not stayed until they can be heard.*" (Appellants' Petition for Rehearing, page 4; emphasis added.)

Needless to say, no such restraining order was issued by this or any other court. This court, by written order dated September 23, 1964, Action No. 18402, specifically denied stay of execution of the judgment. Janney, thereupon, in his Petition for Writ of Certiorari to the United States Supreme Court, dated October 28, 1964, at page 15, complained to that court:

> "In addition, both corporations have a substantial interest in continuing to enjoy the services of their President. *Their interests are prejudiced by a judgment that deprives them of these services.*" (Emphasis added.)

At the time of the issuance of the restraining order, the trial court was exactly following the mandate of this court in attempting to settle the accounts of the receiver (Tr. 19745, page 5) and *then* relieve him of his responsibilities. Until that was accomplished, obviously the receiver had charge of the properties, and, equally obvious, was the court's power to restrain Janney in his attempt to force his way onto the properties.

IV

ORDER DENYING MOTION TO ALTER OR AMEND JUDGMENT

Under this heading appellant Janney contends that the trial court erred in denying his motion to alter or amend the judgment entered after appeal. The motion was denied upon the ground that it was not timely, under Rule 59 of the Federal Rules of Civil Procedure. (Tr. 21099, page 178.)

Preliminarily it must be noted that appellant's opening brief does not contend in any way that the said judgment after appeal is incorrect in any regard. A careful examination of the said judgment (Tr. 21099, pages 148-153) shows that it follows this court's mandate (333 F. 2d 257, 276) precisely and exactly.

Appellant Janney, in his Points and Authorities in Opposition to Motion to Dismiss Appeals, filed in these appeals July 8, 1966, conceded:

> "* * * a reading of the lower Court's Judgment and Orders After Appeal would indicate that the only apparent deviation by the lower court in its attempted compliance was in regard to Paragraph 13 (c), at Page 277 of this Court's Decision."

An examination of the said paragraph 13 (c) shows that it too precisely follows the mandate of this court.

Appellant Janney argues (Opening Brief, pages 21-22) that the trial court erred in denying his motion to alter the judgment and cites as his authority cases concerning entry of judgment. Appellant Janney argues that the judgment was entered on November 30, 1964, and that his motion to alter was, therefore, timely.

Appellant Janney is less than candid in failing to note that there was a hearing lasting several days in the trial court on this matter (Tr. 21099, page 36), with all parties present (Tr. 21099, page 178) and at that hearing extensive evidence was introduced, both oral and documentary, concerning the time of entry of the subject order. Appellant Janney requested that a portion of the reporter's transcript of the said hearing be included in the record on appeal (see Appellant's Desigation of Record filed in the trial court on July 27, 1965 (Tr. 21099, page 43), which was adopted by appellant Janney in his "Statement of Points and Designation of Record" filed in this court November 15, 1966. In that designation Janney requested:

> "* * * a portion of the reporter's transcript of proceedings of June 21 and June 22, 1965, relating to the motion to retax costs and the motion to alter or amend judgment, including testimony of Ethel Barton and attempt to offer the testimony of Rose Kizer, including notation as to time when Mrs. Kizer left the courtroom." (Note: These witnesses were clerks of the court.)

See also Tr. 21099, page 38 et seq. where Janney, in his listing of points to be urged on appeal clearly spells out the fact issue resolved by the trial court.

The trial court, based upon evidence introduced at the said hearing found that the judgment had been entered on November 23, 1964. (Tr. 21099, page 56.)

Appellant Janney apparently has abandoned his request to have the said reporter's transcript included

in the record on appeal. (See Points and Authorities in Opposition To Motion To Dismiss Appeals filed by Janney in this court July 8, 1966, page 6.) Janney now attempts to premise his argument before this court upon a docket entry, ignoring the fact that the trial court has already considered this matter and ruled thereon, upon the basis of extensive evidence, including the said docket entry, as well as a great deal of other evidence.

Before this court then the question, obviously, is not "What are the docket entries?" but rather "Did the trial court err in finding that the order involved herein was entered on November 23, 1964?"

Appellant Janney makes no attempt to review the evidence before the trial court. Instead, he contends that action of the clerk of the court is superior to that of the judge! This is obvious nonsense.

Lest, however, there be any thought that there was not good and sufficient evidence before the trial court to sustain its finding that the judgment involved here *was* entered on November 23, 1964, even though appellant has not brought up the evidence below, the attention of this court is invited to at least one example of that evidence below (see Tr. 21099 at page 32), where, under date of November 23, 1964, appears the following entry:

> "filing judgment and orders after appeal. *Entg. judgment and orders after appeal.*" (Emphasis added.)

It is respectfully submitted that inasmuch as appellant Janney has chosen not to bring before this court

the reporter's transcript and evidence adduced before the trial court on the instant question, although he had originally designated the same, he cannot be heard here arguing that the trial court erred and that this court should make a fact determination contrary to the determination of trial court.

V

MOTION TO RETAX

Under this heading, appellant Janney contends that the trial court erred in striking a cost bill filed by him purportedly on behalf of Ely Valley Mines, Inc.

Appellant Janney states (Opening Brief, pages 9-10):

> (1) That the said cost bill was filed on January 6, 1965;
>
> (2) Pursuant to the rules of court, the same was required to be filed not later than five days after notice of entry of the decree of judgment; and
>
> (3) That the civil docket does not show service of any notice of entry of judgment.

Because the docket does not show service of notice of entry of judgment, Janney contends that the trial court erred in finding that notice of entry of the said judgment was given not later than November 30, 1964.

Again appellant Janney ignores the fact that this matter was heard by the trial court, at a contested

hearing lasting several days (Tr. 21099, page 36), with all parties present (Tr. 21099, page 54), with evidence introduced, and a finding made by the trial court, based upon such evidence that notice was indeed given not later than November 30, 1964 (Tr. 21099, page 55).

Inasmuch as appellant Janney has not brought before this court the record, the reporter's transcript and the evidence that was before the trial court when it considered this matter, he cannot now question that finding.

See *Rosenblum v. Anglin,* 135 F. 2d 512, where this court said, at 513:

> "Evidence was received at the trial, but was not made a part of the record on appeal. Therefore the trial court's findings of fact must be accepted by us as correct."

Even though appellant Janney has not brought up the evidence below, attention is invited to Tr. 21099, page 42, line 28 where appellant Janney designates as part of the record on this appeal:

> "Clerk's letter to counsel advising of the entry of Judgment and Orders after Appeal, dated November 30, 1964."

VI

CONCLUSION

It is respectfully submitted that the instant appeals are totally devoid of merit and should be summarily denied.

Dated, San Francisco, California,
January 20, 1964.

SULLIVAN, ROCHE, JOHNSON & FARRAHER,
ARTHUR H. CONNOLLY, JR.,
GERALD J. O'CONNOR,
Attorneys for Appellees.

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

GERALD J. O'CONNOR,
Attorney for Appellees.

Nos. 19753-4-5

In the

United States Court of Appeals

For the Ninth Circuit

LUCKENBACH STEAMSHIP COMPANY, INC., a corporation,

Appellant,

vs.

OLIVER J. OLSON & CO., a corporation, and MARINE LEOPARD CARGO,

Appellees.

MARINE LEOPARD CARGO,

Appellant,

vs.

OLIVER J. OLSON & CO., a corporation, and LUCKENBACH STEAMSHIP COMPANY, INC., a corporation,

Appellees.

Petition for Rehearing

MCCUTCHEN, DOYLE, BROWN, TRAUTMAN & ENERSEN
NORMAN B. RICHARDS
601 California Street
San Francisco, California 94108

HAUERKEN, ST. CLAIR, ZAPPETTINI & HINES
GEORGE H. HAUERKEN
635 Russ Building
San Francisco, California 94104

Proctors for Marine Leopard Cargo Claimants named in Schedules A and B to Final Decree

DERBY, COOK, QUINBY & TWEEDT
ROBERT H. THEDE
465 California Street
San Francisco, California

Proctors for Claimant Underwriters at Lloyds

CECIL F. POOLE
United States Attorney

JOHN F. MEADOWS
Attorney in Charge
Admiralty & Shipping Section
Department of Justice
Federal Building
450 Golden Gate Avenue
San Francisco, California 94102

Proctors for Claimant United States of America

SORG PRINTING COMPANY OF CALIFORNIA, 346 FIRST STREET, SAN FRANCISCO 94105

TABLE OF AUTHORITIES CITED

Texts

Nos. 19753-4-5

In the

United States Court of Appeals

For the Ninth Circuit

LUCKENBACH STEAMSHIP COMPANY, INC., a corporation,

Appellant,

vs.

OLIVER J. OLSON & CO., a corporation, and MARINE LEOPARD CARGO,

Appellees.

MARINE LEOPARD CARGO,

Appellant,

vs.

OLIVER J. OLSON & CO., a corporation, and LUCKENBACH STEAMSHIP COMPANY, INC., a corporation,

Appellees.

Petition for Rehearing

1. We had thought that the decision of this court in the *President Madison*[1] placed this circuit beyond the scholar's criticisms of many judicial valuations, since it recognized expressly the basic underlying rationale of the market value test. Market value appraisal based on sale prices is not and should not be a theoretical abstraction. There should be a rational basis for its use or its rejection. The rationale is set forth in *Bonbright Valuation of Property,* Vol. 1, page 91 (a text cited by all parties to this litigation):

> "Indeed, the most plausible defense of market value as the usual measure of compensation under the laws of damages and of eminent domain is that it is often the best available measure of value to the owner.
>
> "* * *.
>
> "Net market value not only often sets the lower limit of value to the owner. It may also set an upper limit if it represents the price at which the owner could replace his property with an equally desirable substitute."

The same is stated as Hornbook principle in *McCormick on Damages,* § 45, page 173:

> "True it is that articles of commerce destined for sale must be appraised, to measure loss through conversion or breach of contract, by the market prices at which such articles are bought and sold. The reason for the rule is this: the loser of the article, if awarded the prevailing price therefor, may enter the market and, with the sum awarded, replace the article lost with a substitute identical in kind and quality."

The traditional Admiralty damage principle of *restitutio in integrum* has always been thought to require valuation in accordance with these principles and our former reading of the *President Madison.* See, *Roscoe on Damages in Marine Collisions,* 3rd Ed., 1929, Chapter 2.

The court's citation of real property condemnation cases in support of its decision on ship valuation is inapposite. The law

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1. 91 F.2d 835 (9th Cir. 1937).

has always presumed that the earning power of land is replaceable and many special doctrines have been used to supplement market sales prices to appraise "loss to the owner" of real property. Furthermore, land can because of its nature never be evaluated by reference to reproduction. Productive machinery on the other hand is usually evaluated this way unless it is common enough that contemporaneous sales prices establish its replacement value to the owner. Even in real property cases under the law of eminent domain the law has not reached the point reached by the court in the present case. See, *Orgel on Valuation Under Eminent Domain,* Volume 1, page 174:

> "We are therefore forced to the conclusion that market value, strictly interpreted as meaning probable sale price, cannot be defended as even an approximate measure of value to the owner in most of those cases which actually arise under the law of eminent domain. It is hardly necessary to add, however, that the courts do not accept market value, so interpreted, as the invariable measure of compensation."

We strenuously urge the court to reconsider its overruling of the District Court on this point and ordering appraisal on the basis of probable sale price of the vessel. The District Court followed both reason and authority in rejecting sale prices in a market that was not a replacement market and finding no relevant market since Olson was statutorily prohibited from buying in the only existing market of similar vessels. The present case presents almost a classic instance for resort to valuation on the basis of reproduction depreciated to determine the fair estimate of the loss to the owner as was done in *Standard Oil Co. v. Southern Pacific Co.,* 268 U.S. 146.[2]

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2. This case is cited to support the court's present opinion as if it were contrary to the former decision in the *President Madison* and the decision of the District Court in this case. We submit that this is a mis-citation since the *Supreme Court* in Southern Pacific found no market in which the vessel could be sold *or* bought and sustained reproduction depreciated valuation.

This court may have misconceived the argument in support of of the District Court's valuation. No counsel meant to suggest that coastwise privileges had a true market value (Opinion p. 7). All concede they had none because no one was able to prove a coastwise market due to the fact that (as the record shows) coastwise sea trade had been rendered substantially non-existent by rail competition except for the Olson Company's specialized lumber trade on this coast.

2. By sanctioning "payment" instead of "liability" as determinative of a limiting vessel's claim against the non-limiting vessel, the court has approved a factor which can be unilaterally and capriciously determined by a party to the case and not by law. Limitation of liability pursuant to 46 U.S. Code § 183 is a defense that can be waived and need not be raised at all by a shipowner. The court's decision has made it possible in future cases for a shipowner with questionable limitation rights to compromise the issue by "payment" of third party claims primarily at the expense of the other vessel involved in the collision. This ruling invites chicanery and subterfuge.

3. Inclusion of cargo liability without regard to limitation until after the balance is struck will always result in the non-limiting vessel bearing one-half of the total losses and this is the only way such result can be uniformly accomplished. In no instance other than a fact finding on remand of *Howard Olson* value equivalent to or less than *Marine Leopard* damage will Luckenbach bear losses equal to those borne by Olson in this case. By implying that such a fact finding may or should be made on remand, the court evades the legal issue presented, namely, does the law require that the limitation rights of Olson be used to reduce the liability that would otherwise fall on Luckenbach in a *Chattahoochee*[3] division of damages, with the result in most instances that equally blameworthy Luckenbach bears less loss than the limiting Olson Co., all to the prejudice of cargo owners who are blameless.

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3. 173 U.S. 540 (1899).

4. The court's opinion has also evaded the interest point by again assuming there may ultimately be no offset payment. The point is that interest does not run on the balance due as the court assumes, interest runs on all damages of both vessel owners. The same money result is reached but the distinction is important particularly with relation to the matter of interest on General Average disbursements. Interest on GA disbursements cannot be distinguished on the basis put by the court, viz., that it is payment for the use of money. All interest allowances in Admiralty are on this basis. For instance, a disbursement for temporary repairs to the vessel is contributed to by cargo in general average. The court has held that for the loss of use of this money Luckenbach received 5 + 7 or 12% to the date cargo first reimbursed the shipowner, compounded at 7% thereafter on the basis of a case that held the shipowner was entitled to 5% to the date of reimbursement. Interest should be allowed on all disbursements and damages at the same rate in accordance with the later cases from the Second Circuit and the uniform practice of this circuit.

SUGGESTION FOR REHEARING EN BANC

The decision of this court on division of damages in a limitation case is a matter of first impression, i.e., there are no reported decisions holding on the exact point presented by this case.[4] The reason for this court's decision is directly contrary to the holding of the Supreme Court in the *Chattahooche*[5] and the holding of this court is directly contrary to the reasoning of the Supreme Court in the *North Star*.[6]

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4. The opinion in the *George W. Roby*, 111 Fed. 601 (6th Cir., 1901) applies limitation after division of damages in the manner contended for by cargo in this case. However, it is apparently true as suggested by Luckenbach that the same dollar result could have been reached in that case on Luckenbach's theory.

5. 173 U.S. 540 (1899).

6. 106 U.S. 17 (1882).

It should also be noted that there has not been cited by any counsel a single case valuing a vessel (or other commercial machinery) on the basis of sales prices of vessels that the subject owner could not legally have purchased. The instruction on remand involves a departure from all precedent.

We respectfully suggest that in view of the novel questions presented, rehearing by the full court is eminently appropriate.

Respectfully submitted,

McCutchen, Doyle, Brown,
Trautman & Enersen

By Norman B. Richards

Hauerken, St. Clair,
Zappettini & Hines

By George H. Hauerken

Proctors for Marine Leopard Cargo Claimants named in Schedules A and B to Final Decree

Derby, Cook, Quinby & Tweedt

By Robert H. Thede

Proctors for Claimant Underwriters at Lloyds

Cecil F. Poole
United States Attorney

John F. Meadows
Attorney in Charge
Admiralty & Shipping Section

By John F. Meadows

Proctors for Claimant United States of America

CERTIFICATE OF COUNSEL

I certify that in connection with the preparation of this Petition I have examined Rule 23 of the United States Court of Appeals for the Ninth Circuit and in my judgment the Petition is well founded and it is not interposed for delay.

Norman B. Richards

Nos. 19,753, 19,754 and 19,755

In the

United States Court of Appeals

For the Ninth Circuit

OLIVER J. OLSON & CO., a corporation, *Libelant,* vs. The American Steamship MARINE LEOPARD, etc., and LUCKENBACH STEAMSHIP COMPANY, INC., a corporation, *Respondents.*	No. 19,753
LUCKENBACH STEAMSHIP COMPANY, INC., a corporation, *Libelant,* vs. OLIVER J. OLSON & CO., a corporation, et al., *Respondents.*	No. 19,754
In the Matter of the Petition of OLIVER J. OLSON & CO., a corporation, for exoneration from, or limitation of, liability, as owner and operator of the Steamship HOWARD OLSON.	No. 19,755

Petition of Appellee Oliver J. Olson & Co. for Rehearing En Banc

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BROBECK, PHLEGER & HARRISON
J. STEWART HARRISON
111 Sutter Street
San Francisco, California 94104

Proctors for Oliver J. Olson & Co.

SORG PRINTING COMPANY OF CALIFORNIA, 346 FIRST STREET, SAN FRANCISCO 94105

TABLE OF AUTHORITIES CITED

Cases

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Nos. 19753, 19754 and 19755

In the

United States Court of Appeals

For the Ninth Circuit

OLIVER J. OLSON & CO., a corporation, *Libelant,* vs. The American Steamship MARINE LEOPARD, etc., and LUCKENBACH STEAMSHIP COMPANY, INC., a corporation, *Respondents.*	No. 19,753
LUCKENBACH STEAMSHIP COMPANY, INC., a corporation, *Libelant,* vs. OLIVER J. OLSON & CO., a corporation, et al., *Respondents.*	No. 19,754
In the Matter of the Petition of OLIVER J. OLSON & CO., a corporation, for exoneration from, or limitation of, liability, as owner and operator of the Steamship HOWARD OLSON.	No. 19,755

Petition of Appellee Oliver J. Olson & Co. for Rehearing En Banc

Appellee Oliver J. Olson & Co. respectfully petitions this Court for rehearing *en banc* on the following issues and on the following grounds:

I.

VALUATION OF THE HOWARD OLSON

On this issue the Court has now held the only test of value of a commercial asset is the amount for which it can be sold. It has

held that the fact that the asset destroyed by a tort feasor cannot be replaced by its owner for the amount it would bring in a sale is immaterial. The decision as rendered adopts an over-simplified axiom, i.e., "The worth of a thing is the price it will bring." This completely abandons the law of "restitutio in integrum."

The opinion in this case is not limited to its own facts. It sets down a sweeping rule of law on the measure of damages. The rule can be applied to any income producing asset, not just ships, and with disastrous and unjust results.[1]

The holding of the opinion can be fairly and completely summarized as follows:

Olson had a lumber schooner with coastwise privileges, and it earned for Olson $78,000.00 per year net.[2] If it were sold foreign it would bring only $200,000.00 because foreign purchasers did not need coastwise privileges, and there were many ships foreign operators could buy that suited their needs. So the price was very low. Other operators requiring coastwise privileges, for reasons of their own, were not interested in acquiring such a specialized ship as an addition to their fleet, consequently there were no "domestic" sales to be used as a measure of value.

The ship is destroyed by a tort feasor. There were virtually no vessels suitable as lumber schooners that had coastwise privileges,

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1. If this opinion is meant to apply to a factual situation where the owner of an asset is found as a matter of fact in the position of attempting to dispose of the asset at the time of its destruction, then this Court has reversed a finding by the District Court that is supported by substantial evidence, and not clearly erroneous. In addition, the Court has apparently agreed with the District Court in its holding that a tort feasor cannot take advantage of this fact even if true. If the conclusion of the opinion is based upon the statement appearing at page 4 "Olson made no effort to replace her with another freighter but, in accordance with the trend in the coastwise trade, turned exclusively to barges" then the Court has overlooked the uncontradicted fact that such replacement barge cost Olson $750,000.00 to $800,000.00. Transcript before Commissioner (R.T.C. herein hereafter), page 129, and that no such barge would have been built were it not for the loss of the *Howard Olson*. R.T.C. 29, 33, 431-434, and further that because of the loss of the *Howard*, Olson Co. could not see fit to sell the *Mary* even though they had offers of $400,000.00 for her. R.T.C. 40, 41 and 53.

2. R.T.C., page 27.

available for purchase. It is uncontradicted that replacement cost depreciated was $430,000.00 and that it would cost Olson approximately $430,000.00 to obtain a replacement for the lost vessel. The Court awards "market value" of $200,000.00 as restitution for the loss.

Without argument we ask this question:

Has Olson received "restitutio in integrum?"

The Court has stated in its opinion at page 9 "The fact that no domestic buyer bought the *Barbara Olson* or the *Karen Olson,* both of which had coastwise privileges, indicates that these privileges added no appreciable marketable value to those vessels or to the *Howard Olson.*"

The fact that this feature may not have been marketable makes it no less necessary to Olson. The fact that no domestic buyer bought these ships proves only that no coastwise operator, who could use a vessel particularly adapted for the lumber trade, were then inclined to increase their fleet. The statement of the Court begs the question that was answered in the *President Madison,* 91 Fed. 2d 835, (9th Cir. 1937) wherein the Court rejected a "sale price" measure by stating of The Harvester:

> "Her peculiarities . . . would not have been reflected in the price commanded by the vessel in a market where these features were unnecessary and superfluous. *Such a price could not give the owner, who needs these special features for his trade, the value of what he has lost.*" (emphasis added)

The fact that no domestic buyer paid more for the *Karen* and *Barbara* merely proves the fact assumed in the *President Madison,* i.e., that no one would be interested in buying the vessel with her special features to compete in the Skagit river trade. In this case it was shown by the record that Olson was well established in the lumber carrying business and was the one coastwise operator that was making a substantial profit, R.T.C. 418-423. The fact that a buyer with an I.C.C. certificate did not care to increase its fleet of

lumber schooners and enter into competition with Olson does not prove that the ship was any less valuable to Olson.[3]

The Commissioner (and thus the District Court) stated "I find no decided case that accords any relevance to a market of vessels which could not have been replacements for the vessel lost . . ."

Counsel for Luckenbach in nine years of looking haven't found one either, and we urge the Court that this case should not be the first, for it will revolutionize the measure of damages for any asset having a unique commercial value to its owner.

We respectfully urge that the Court insert in its opinion the uncontradicted fact that the *Howard Olson* could not be replaced by a comparable vessel for use in the coastwise trade for less than $430,000.00 and thereafter reason from that premise. We suggest the conclusion will be different from the present opinion, but if not, at least all of the essential premises will be readily available for further review should the occasion arise.

We also call to the Court's attention that in the case of *Standard Oil Co. v. Southern Pac. Co.,* 268 U.S. 146 (1924), upon which the Court places great reliance, there was no market into which a vessel could be bought or sold. The Supreme Court therefore adopted an artificial test to determine what it could have been sold for if sales were permitted, but this case assumes that if sales were permitted, like vessels could have been purchased to replace the one that was lost. The case does not involve a vessel with unique commercial value to the owner, but involves only determining value in a situation where sale price and cost of a replacement were presumed to be the same if sales and purchases had been permitted. This is proved by the fact that the award was actually based on evidence of "cost of reproduction" with a small reduction for depreciation. In other words—what it would cost to replace the vessel lost.

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3. It is very probable that Olson would not have sold to a potential competitor. This is shown by the fact that Olson never offered the vessel for sale on an open basis, but only asked brokers to bring an offer which would be passed on by the Board of Directors. R.T.C. 622 and 958.

The opinion states (at page 8) that "no replacement factor was injected" in *Standard Oil Co. v. Southern Pac. Co.* (supra).

The Fourth Circuit has interpreted this case directly opposite. In *Rand v. Lockwood,* 16 F.2d 757 (C.C.A. Fourth Cir. 1927) the Court relied on *Standard Oil v. Southern Pacific* for the following statement appearing at page 759:

> ". . . If one man by negligence or design destroys the property of another, he must put the injured party in the situation in which he was before the wrong was done. If he has sunk his ship, he must give him money enough to enable him to get as good a ship, either by buying another in the market, if that can be done, or, if it cannot, by having one built. *Standard Oil Co. v. Southern Pacific,* 268 U.S. 146."

If Olson can recover only the amount for which the vessel could have been sold, without regard to cost of replacing this income producing asset, then the entire matter of damages should be retried, and Olson awarded additional damages representing the loss of net earnings from the vessel during its working expectancy.[4] The only reason this is not normally done in collision cases is that there exists a basic presumption that the award for loss of the vessel puts the owner in the position to replace it and continue its earnings.

The Hamilton, 95 Fed. Rep. 844 (D.C.E.D. N.Y. 1899).

In the cited case the Court refused to award loss of earnings on the ground that "it is contemplated that the market abounds in ships awaiting purchase, so that with the $125,000.00 the libelant may at once substitute a new ship for the one lost."[5]

The opinion at page 8 states:

> "The *President Madison,* in our opinion, does not represent a holding that the market value test is whether other

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4. This can be done from the record made before the Commissioner.

5. *The Hamilton* (supra) is cited and quoted with approval by the Ninth Circuit in *Redwood-Sun-D'E,* 81 Fed. 2d 680 at page 685, 1936 AMC 774 at page 785.

vessels can be purchased in the open market to replace the one which is lost."

Without argument, we call the Court's attention to language of the *President Madison*, 91 Fed. 2d 835 at 844, wherein almost identical words were used to phrase the argument that lost.

> "It is urged that the market value test is not whether other vessels can be purchased in the open market to replace the one that is lost . . ."

And Judge Denman's flat rejection of the contention:

> "The argument *overlooks* the economic reasons for the market value test, and for substituting other criteria when that fails."

It is suggested there could not be a more definitive holding on the issue.

In the twenty years since Judge Denman's decision there has been more and more specialization of machines for the particular purposes of their owners and thus the "economic reasons" for "substituting other criteria" when selling price does not reflect the value of the lost asset are more prevalent.[6]

Before this Court chooses to "overlook" these economic reasons, it is respectfully requested that the issue be reheard *en banc*.

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6. As an example: A manufacturer owns three computers, each programmed for his special needs. He decides to replace two of them and contracts to buy a different type to serve their purpose, intending to keep the third. While the replacements are being built the third is destroyed by a tort feasor. Before a value can be placed on the third the owner disposes of the first two as originally planned. No buyers need the special features, so he sells them as basic machines with no increment for the programming. As to the third, it will cost twice as much as he got for each of the first two in order to get a computer with the special programming needed in his business. Is not the liability of the tort feasor measured by replacement cost, less depreciation? Certainly not by the sale price of the other two machines, "since such a price could not give the owner, who needs those special features for his trade, the value of what he has lost."

The facts of this example are identical to the case at bar except a programmed computer has been substituted for a ship with coastwise privileges.

II.

THE DISPOSITION OF THE LIABILITY FOR DEATH AND PERSONAL INJURY

The Court has held that even though Olson was granted full limitation of liability, it must nevertheless bear one-half of the personal injury and death claims from a $60.00 per ton fund by reason of 46 U.S.C. 183(b). The Court has based its conclusion on two premises. The first is stated at page 12 of the opinion as follows "The purpose of 183(b) is to secure some recovery to death and personal injury claimants; there is no indication that it was also intended to alter established Admiralty concepts by allowing a limiting ship to avoid primary liability in a mutual fault collision." This statement misses the point. None of the limitation statutes alter liability, they merely limit the obligation to pay. Before the 1936 ($60.00 per ton) amendment the liability of a limiting ship at fault, was existent and remains existent since the amendment. Only the obligation to pay is affected.

The question then is not whether the 1936 amendment altered the liability of a limiting ship in a mutual fault collision, but whether it altered the obligation to pay. Olson's position is that it altered the obligation to pay only to the extent that the loss cannot be borne by the non-limiting ship *without* imposing an additional burden on the non-limiting ship.

The opinion at page 12 states: ". . . it does not follow that the limiting ship in a mutual fault collision can avoid liability altogether *at the expense of the non-limiting ship.*"

We agree with this statement, and went to some length in the Olson brief (pages 17, 24) to emphasize that in the factual situation before the District Court, *no additional expense* was placed on the non-limiting ship by requiring it to bear all the personal injury and death claims, because the entire amount could be set off against Olson's damages with the net result that each ship bears one-half of Personal Injury and Death Claims (P.I. &

D. hereafter) and no $60.00 per ton payments inure to the benefit of Cargo.

If the valuation of the *Howard Olson* is to be reduced to the point where Luckenbach's damages are equal to, or less than Olson's, the monetary *result* reached in the opinion in this case is approximately correct, but the method of reaching it is erroneous. A flat rule that the limiting ship must pay one-half of P.I. & D. out of the $60.00 per ton fund, if adequate, leads to results incompatible with the purpose of the $60.00 per ton amendment.

As shown in Olson's brief, pages 18 and 19, the legislative history of the amendment shows that the wording was intended to "leave undisturbed the position which Cargo claimants held since the enactment of the original limitation of liability act."

To achieve this end in a mutual fault collision case where one vessel limits and the other does not, *only one rule* will work in all arithmetical situations. The premises upon which the rule is based are established in the Olson brief without contradiction from Luckenbach or Cargo. The premises and the rule can be stated as follows:

(1) Cargo interests are not entitled to benefit, either directly or indirectly from a shipowner's payments to personal injury and death claims from a $60.00 per ton fund.

(2) The amendment was intended primarily to guarantee a recovery to personal injury and death claimants where no other source of recovery is available, and was not intended as an *outright* imposition of *additional liability* on a limiting vessel.

(3) The maritime law applicable to mutual fault collision has, as one of its primary purposes, the equal division of damages between the colliding vessels.

(4) If in a mutual fault collision a limiting vessel were required to pay one-half of the personal injury and death claims from the $60.00 per ton fund, irrespective of the comparative damages between the vessel, such payment would inevitably tend to create or increase the fund available for Cargo.

(5) If the non-limiting vessel were required to bear the total liability to all personal injury and death claims, irrespective of whether the amount could be set off against the damages of the limiting ship, there would result an unequal division of damages between the vessels.

On the above premises, there appears to be only one rule that will achieve the purposes of the Limitation of Liability Statutes and preserve the objective of equal division of damages between the vessels. The rule can be stated as follows:

In a mutual fault collision, where one vessel is a total loss and successfully limits liability, the non-limiting ship is primarily obligated to pay all personal injury and death claims, however, in striking the balance between the vessels the non-limiting ship shall be required to bear the excess of one-half of personal injury and death claims, only to the extent that such excess can be set off against the damages of the limiting ship, and to the extent that such payments cannot be set off, the cost must be borne by the limiting vessel from the $60.00 per ton fund, up to the extent of the fund, if necessary.

The District Court correctly applied this rule to the arithmetic of the case before it. The District Court found that Olson suffered damage in the amount of $445,588.00. Luckenbach suffered damage in the amount of $202,809.00 before payment of personal injury and death claims. The difference is $242,779.00. The personal injury and death claims totaled $181,432.00. Luckenbach was required to bear the primary liability for personal injury and death claims. In striking the balance between the vessels, Luckenbach was required to bear the excess of one-half to the extent that such excess could be set off against Olson's damages. In this case the entire remaining one-half ($90,716.00) can be set off. This results in Luckenbach paying the entire $181,432.00. Adding this total amount to its damages, giving an overall total of $384,241.00 to be set off against Olson's $445,588.00.

Since there is still an excess of damages on the Olson side of $61,349.00, Luckenbach is required to pay one-half of that difference to Olson thus equalizing the damages between the vessel. Each vessel thus bears $414,915.00 of the total damage.[7] This does not result in Olson "avoiding liability altogether at the expense of the non-limiting ship," and in fact does not increase the expense of the non-limiting ship one cent.

This also achieves the statutory intent of not requiring Olson to pay anything from the $60.00 per ton fund that would inure to the benefit of Cargo.

If the valuation of the *Howard Olson* were reduced to $200,000.00 as suggested by the present opinion of the Court, the rule with respect to allocation of personal injury and death claims would operate as follows:

Olson's total damages would be $215,588.00. Luckenbach's would remain at $202,809.00 before payment of death and personal injury claims. The difference would be $12,799.00. Applying the correct rule Luckenbach would be required to pay the primary liability to personal injury and death claims, but in striking the balance between the vessels, Luckenbach would be required to bear the excess of one-half only to the extent that such excess could be set off against Olson's damages.

This excess capable of offset is $6,389.50 (or one-half the original difference in damages). So Luckenbach would bear $97,105.50 (one-half total, plus excess of one-half allowable as set off) of personal injury and death claims and Olson would bear $84,326.50 (one-half total, less excess borne by, and set off by, Luckenbach) from the $60.00 per ton fund. Each would add their respective liabilities to their damages, and the total suffered by each vessel is equalized at $299,914.50. Since the damages are then equalized there would be no further payment by Lucken-

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7. The amount paid by Luckenbach to Olson is, of course, surrendered to the limitation fund for benefit of unpaid claimants.

bach to Olson.[8] Since there would be no payment into Olson's limitation fund for the benefit of Cargo, the payments by Olson from the $60.00 per ton fund would not inure to the benefit of Cargo. Thus the purposes of the Limitation Statutes would be achieved, and there would be equal division of damages between the vessels, and no avoidance of liability by Olson at the expense of Luckenbach.

Unlimited examples could be given proving the validity of the rule as set out herein, but no further purpose would be served.

A flat requirement that each ship bear one-half the personal injury and death claims at the outset (as the opinion now holds) will result solely in making the $60.00 per ton fund inure to the benefit of Cargo.

If the valuation of the *Howard Olson* is affirmed at $430,000.00, and the Court adheres to its opinion on allocation of death and personal injury claims, Luckenbach would be required to bear a primary liability of *only* one-half the total personal injury and death claims, Luckenbach's total damages would be reduced by $90,716.00 to a total of $293,525.00. Olson would be required to bear one-half of personal injury and death claims from the $60.00 per ton fund and Olson's damages would be increased by $90,716.00 to a total of $536,304.00. If the balance were then struck between the vessels the difference would then be $242,-779.00. Luckenbach would be required to pay into Olson's limitation fund one-half this difference or $121,389.00. This amount (or at least 80% of it, if the fund is prorated between Cargo and one-half personal injury and death claims as the opinion now holds) would go to benefit of Cargo.

The District Court, by correctly allocating personal injury and death claims to Luckenbach, created a fund of $30,673.00. If

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8. Since the vessels each advanced one-half of personal injury and death claims the decree would provide that Luckenbach repay Olson $6,389.50, plus interest.

Olson is required to pay $90,716.00 from the $60.00 per ton fund, the fund available to Cargo is increased to $121,389.00; an increase of $90,716.00, the exact amount of the payments under the $60.00 per ton fund.

This would permit Cargo to get the direct benefit of the $60.00 per ton fund contrary to congressional intentions and further leaves Olson bearing $90,716 more of the damages than Luckenbach, solely for the benefit of Cargo, even though Olson successfully limited liability.

Therefore it is obvious that the allocation of personal injury and death claims in accord with the present opinion defeats the purposes of the Limitation Statutes and does not achieve equalization of damages between the vessels.

In addition, the application of the correct rule permits Cargo to recover from the Olson limitation fund the full amount of Olson's recovery from Luckenbach to the extent that such recovery represents Olson's "interest in the vessel", and nothing more.

It is respectfully submitted that the present opinion on this issue is based upon the erroneous premise that permitting the limiting ship to "avoid liability altogether" creates an additional "expense of the non-limiting ship". Irrespective of this Court's final decision on valuation the opinion should be revised to set out the correct rule of allocation of personal injury and death claims.

CONCLUSION

Both of the issues herein involve important questions of law and are not limited or controlled by the facts of this case; they each require the reconsideration of the Court.

Respectfully submitted,

J. Stewart Harrison
Brobeck, Phleger & Harrison
Proctors for Oliver J. Olson & Co.

Undersigned counsel certifies that this petition is not interposed for delay and that in his judgment it is well founded.

J. Stewart Harrison

See also Vol. 3337

No. 19,764

IN THE

United States Court of Appeals

For the Ninth Circuit

HERLONG-SIERRA HOMES, INC.,
a corporation,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

BRIEF FOR APPELLEE

CECIL F. POOLE,
United States Attorney,
ROBERT N. ENSIGN,
Assistant United States Attorney.
450 Golden Gate Avenue,
San Francisco, California 94102,
Attorneys for Appellee.

BERNAU-WALSH PRINTING CO., SAN FRANCISCO

Subject Index

Table of Authorities Cited

Cases

Statutes

No. 19,764

IN THE

United States Court of Appeals

For the Ninth Circuit

HERLONG-SIERRA HOMES, INC., a corporation, *Appellant,* vs. UNITED STATES OF AMERICA, *Appellee.*	

BRIEF FOR APPELLEE

Appellant's Jurisdictional Statement being correct, and its Statement of the Case being adequate, we will pass immediately to consideration of the four points argued by appellant.

1. The first of these is that the United States was not entitled to enforce appellant's note and deed of trust because the conduct of the United States (detailed in appellant's brief, pages 6-9 and 21-24) had prevented the appellant from performing its contractual duty of making installment payments. One answer to this is that, so far as we can ascertain, there is no case holding that the obligation to pay money can be excused or delayed by reason of the creditor's interference with the debtor's means of

obtaining money. This may be because money, in theory at least, is always available, from an infinite number of sources.

A second answer to the argument is that even if appellant's failure to pay the *full amount* of each installment could be excused, the record shows no excuse for appellant's failure to pay *any* amount after August, 1956.

A third answer to the argument is that it derives essentially from the principle of estoppel, which, where it is based upon improper and unauthorized acts of government agents, cannot be invoked against the government. *Cramer v. U. S.,* 261 U.S. 219; *Utah Power and Light Company v. U. S.,* 243 U.S. 389.

A fourth answer to the argument is that what the Commanding Officer of Sierra Ordnance Depot did and did not do lay well within the scope of his discretion. If his actions and inactions caused appellant to lose tenants for its housing units, this was *damnum absque injuria* to the appellant, both with respect to its offensive position under the Tort Claims Act and with respect to its defensive position in this foreclosure action.

But the fifth and best answer to the argument is that the District Court had found (Findings 9, 10, 11, 12: T.R. Vol. I, pp. 141-142) that the United States and its agents did not cause the appellant's inability to make payments on the promissory note, or do anything to excuse appellant's failure to make such payments as they became due; and these findings are

amply supported by the evidence. Appellant's brief asserts, but does not undertake to demonstrate, that the findings are unsupported by evidence. This entire matter of the government's obligation or lack of obligation toward appellant, with respect to the achievement of tenancy in appellant's housing units, and the propriety or impropriety of the actions of government agents, was fully discussed in the Tort Claim case mentioned by appellant at page 4 of its brief, which case was consolidated with this for trial, viz. *Builders Corporation of America and Herlong-Sierra Homes, Inc. v. United States,* No. 18,315 in this Court, 320 F. 2d 425. Consequently, we request the Court to examine the following portions of our brief in that case and to consider them as part of this brief: Argument, Points 1 and 2, on pages 5-8; and Appendix, Extracts 2 and 3 on pages 23-49 of Appendix.

2. The second point argued by appellant is that the District Court should have made some provision in the judgment for safeguards against an excessively low bid at foreclosure sale. The answer to this is that, while the federal courts may have the power to set aside a foreclosure sale made at an unconscionably low price, all that is before the Court now is the Judgment of Foreclosure and Order of Sale, not the sale itself. The sale may have been made, and presumably was made, at a perfectly equitable price. And the provisions of California law, such as California Code of Civil Procedure Section 726, are immaterial unless the District Court was wrong in holding that federal law, not state law, controls the right to a deficiency judgment.

3. The third point argued by appellant is that the propriety of a deficiency judgment here should be determined by California law; that California law bars a deficiency judgment; and that, if federal law governs, the National Housing Act should be so construed as to bar a deficiency judgment. The answer to this is:

(a) Even if California law were to be applied, it would not bar a deficiency judgment because Section 580(b) of the California Code of Civil Procedure is concerned with mortgages and deeds of trust "given to secure payment of the *balance of the purchase price*" (emphasis added) of property, and not with security for the payment of money loaned for the purpose of *constructing and equipping* buildings on the mortgaged land, as was the case here. (T.R. Vol. I., p. 141, Finding No. 7.) *American National Bank v. Gorham,* 109 P. 2d 65, 153 Kan. 145; *Syracuse Savings and Loan Association v. Hass,* 234 N.Y.S. 514, 517, 134 Misc. 82. See also *Roseleaf Corp. v. Chierighino,* 59 Cal. 2d 35, 378 P. 2d 97; *Heckes v. Sapp,* 229 Cal. App. 2d 549, 40 Cal. Rptr. 485.

(b) We agree with appellant's statement (p. 39, Brief) that "whether the enforcement of a Federal right is to be controlled by State or Federal law is to be determined in the first instance on [the basis of] which law the Congress intended to make applicable." But we disagree with appellant when it says (p. 41, Brief) that "Resort to the specific language of the Title VIII of the National Housing Act indicates a strong intention of the Congress to make State law applicable." The reference to state law in the statu-

tory definition of the term "first mortgage" [National Housing Act, 48 Stat. 1246, 1247; 63 Stat. 570, 571; 69 Stat. 646] has nothing to do with the matter. Nor does the fact that the note contains a provision [T.R. Vol. I, p. 12] that it shall be construed according to the laws of California. There is nothing whatever in the National Housing Act to suggest that Congress intended the normal right to a deficiency judgment upon foreclosure to be subject to destruction in some states, and not in other states, depending upon the law of the particular state involved. If there were nothing of an affirmative character showing that Congress *did* intend F.H.A. to have the right to a deficiency judgment, the decision of this Court in *U. S. v. View Crest Garden Apts., Inc.,* 268 F. 2d 380, cert. den. 361 U.S. 884, would be decisive. *View Crest* held that F.H.A.'s entitlement to a receiver in a foreclosure case is to be determined according to federal, rather than state, law. There is no less reason, and perhaps more reason, for F.H.A.'s entitlement to a deficiency judgment to be determined according to a uniform, federal rule.

(c) But the National Housing Act is not devoid of an expression of Congressional intent on the point. Section 204(a) of the original Act [48 Stat. 1249] says that where the mortgagor has acquired possession of the mortgaged property through foreclosure or otherwise, he shall be entitled to receive the benefits of the insurance provided for by the Act "upon the prompt conveyance to the Administrator of title to such property satisfactory to him and the assignment to him of all claims of the mortgagee against the

No. 19,793

See also Vols. 3339 3340

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

WESTERN LIGHTING CORP., a corporation,

Appellant,

vs.

SMOOT-HOLMAN COMPANY, a corporation,

Appellee.

PETITION FOR REHEARING.

HERZIG & WALSH,

9465 Wilshire Boulevard,
Beverly Hills, Calif. 90212,

BALL, HUNT & HART,

120 Linden Avenue,
Long Beach, Calif. 90802,

Attorneys for Appellant.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

TOPICAL INDEX

TABLE OF AUTHORITIES CITED

No. 19,793

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

WESTERN LIGHTING CORP., a corporation,

Appellant,

vs.

SMOOT-HOLMAN COMPANY, a corporation,

Appellee.

PETITION FOR REHEARING.

To the Judges of the United States Court of Appeals for the Ninth Circuit:

Western Lighting Corp., a corporation, petitions the above-entitled court for a rehearing after decision affirming the order of the United States District Court, which held Western Lighting Corp., in contempt and assessed a fine of $500 and a further sum of $250 in attorneys' fees.

I.

Title to the Merchandise Passed to the Buyer on August 13, 1964.

Smoot-Holman claims that an injunction, effective August 13, 1964, was violated on September 10, 1964. On that date Western delivered lighting fixtures to the Madison & Arroyo School in Pomona, California, on order of Valley Wholesale Electric Co. The trial court had to determine only one factual problem: Did title to the electrical fixtures pass to the buyer before August 13, 1964? If title passed before that date, Western was not in contempt.

The trial court impliedly held that title had passed on the date of delivery, September 10, 1964. Because

appellant believed this finding had no support by reasonable inference from uncontradicted evidence. An appeal was taken. This court affirmed and provided reasoning in its opinion which we believed ignored the facts, common sense inferences, and the law of sales.

Valley issued its purchase order to Western on May 1, 1964, for certain described lighting fixtures. The order was accepted by Western and was set aside and stored for future delivery to Valley. There is no question but that the merchandise was in existence at that time and there is no reason to disbelieve it was not warehoused at that time. On that date Western became obligated to sell and Valley obligated to buy. Usually it is inferred that parties to a sale of goods intend that title should pass to these goods on the date of contract. This is especially true if the goods are set aside for delivery to the buyer (§1739 California Civil Code, Rule 1). This rule may be qualified if the seller is obligated to deliver to a specified location (§1739 California Civil Code, Rule 5). But the intent of the parties as to the time when title shall pass, always controls (§1738 California Civil Code).[1]

The Valley purchase order is supplemented by two documents issued and executed by the seller Western [bill of lading, Ex. D, and a shipping order, Ex. E]. These bear the date August 10, 1964. There is some suggestion in the opinion that these documents might

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[1]The opinion makes much of language on the purchase order [Ex. E] which was blocked out on the xerox copy attached to the affidavit of Moses: "Released for delivery 8/26/64 not B4" and below a line the words "per Skip 7/24". It is obvious from this that on 7/24 one named Skip wrote on the document that the goods were not to be released from the warehouse before (B4) 8/26/64. The effective date of the injunction was August 13, 1964. The affidavit admitted that delivery was made on September 10, 1964. If date of delivery determines the problem, the notation on the document is immaterial. The purchase order does describe place of delivery. This was not blocked out. This is the only notation which is material to a finding as to intent of the parties. (See §1739 California Civil Code, Rule 5.)

not have been executed on the date which they bear. This inference is opposed by a stronger inference that Western wished to pass title to these goods, which were the subject of the May sale, before the effective date of the injunction, August 13, 1964.

Western had to pass title before August 13, 1964, in order to fulfill its May 1964 contract. Necessity dictated the execution of documents which would pass title irrespective of delivery date of the goods. There is no need to indulge in esoteric interpretation of documents in order to arrive at conclusion dictated by the situation itself.

II.
A Footnote in the Opinion Which Reflect Upon the Integrity of Counsel.

One Footnote in the opinion is of particular concern to counsel rather than to the client.

Footnote 3 is particularly critical of counsel.[2] The lower court made no inquiry into the circumstances under which the affidavit had been prepared or the xerox copy prepared. Judge Curtis of the District Court did not censure counsel or institute an inquiry. The originals were brought to court and produced before any evidence was taken. But this court infers some intent to deceive from the frank statement of Jamieson ". . . that he had told Moses that it was all right to cover the prices, and that he, not Moses, prepared the affidavit". Footnote 3 further says: "As we have seen, much more than 'prices' was covered." This infers that Jamieson directed that something more than "prices" was to be omitted from the Xerox copy.

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[2]"[3]When the apparent covering of parts of the papers 'copied' and attached to Moses' affidavit was called to the court's attention, appellant's counsel announced that he had told Moses that it was all right to cover the prices, and that he, not Moses, prepared the affidavit. As we have seen, much more than 'prices' was covered. . . ."

It so happens that this indirect criticism of Hamer Jamieson, is not justified. An affidavit is attached as an appendix to this petition which states some of the facts. Jamieson was called into this case on Monday, September 14, 1964. He had had no knowledge of the facts and had not tried the case. Jamieson assisted Walsh in preparation of the affidavit of Herbert Moses, president of Western Lighting Corp., on Wednesday, September 16, 1964. He did not direct the Xerox work nor did he see the affidavit after it was prepared.

At the oral argument on September 21, 1964, Jamieson had in his possession the originals which had been shown him by the client the week before. Counsel for Smoot-Holman called attention the the "obvious deletion". The originals were immediately produced and introduced into evidence. The court accepted these originals [Exs. C, D and E], and made no further comment or statement. The subject was never mentioned again in the District Court during the hearing. If prices alone were blocked out on Exhibit A, surely no one could criticize. But other writing was blocked out for which Jamieson has assumed no responsibility. He was as surprised as anyone in the courtroom when he discovered this fact.

This court has had occasion to reverse a District Court judge who precipitously criticized a lawyer without informing him of the charges against him or giving him a chance to prove facts in his defense (*In re Barry Yao Company, Quittner v. Harris* [1961], 286 F.2d 299). Any order which reflects on the integrity of a lawyer should have thorough investigation. It should be a guide to this court that Judge Curtis saw nothing in the conduct of counsel which deserved reprimand. If he had had a suspicion that counsel was attempting to deceive or mislead, he would have inquired into it and this court would have had a full opportunity to review facts of record, not suspicions from a record. (See also

In re L.A. County Pioneer Society [1954], 217 F.2d 190.) This court cannot try Jamieson on a record which did not produce the facts, nor can we argue the merits of his position on a petition for rehearing.

The court has ordered that the record of hearing be forwarded to the State Bar of California. But the policy of the State Bar of California is not to advertise complaints to the general public made against lawyers (Rule 8, Rules of Procedure, State Bar of California). If the order referring this matter to the State Bar of California is unpublished, no harm is done. But if the order referring the matter to the State Bar is published and is of public record, then great harm might be done to this lawyer's reputation. If footnote 3 is published in the permanent reports, counsel's reputation will be harmed. If later counsel is exonerated from any blame, the court could not delete an unfortunate and inaccurate statement from its publication.

We respectfully request this court to delete footnote 3 as unnecessary to the decision because of the grave risk of harm to counsel's reputation. We further request that the order referring the matter to the State Bar of California be placed in the confidential files of the Court of Appeals for the Ninth Circuit pending decision of the State Bar of California.

Appellant respectfully requests that this Petition for Rehearing be granted.

Respectfully submitted,

Joseph A. Ball, of
Ball, Hunt & Hart,
Herzig & Walsh,
Attorneys for Appellant.

December 9, 1965.

Certificate.

The undersigned counsel certifies that this petition is not interposed for delay and that in his judgment it is well founded.

JOSEPH A. BALL

APPENDIX TO PETITION FOR REHEARING.

Affidavit of Hamer H. Jamieson.

State of California, County of Los Angeles—ss.

Hamer H. Jamieson, being first duly sworn, deposes and says:

Since September 1964, I have done some work for the firm of Herzig and Walsh in patent cases which result in litigation. I am available to them on Monday, Wednesday and Friday of each week.

On Monday, September 14, 1964, I was handed an Order to Show Cause issued by the federal district court which cited Western Lighting Corporation for contempt. I was asked to appear in court on the following Monday and oppose the citation. I asked that Herbert Moses, President of Western Lighting Corporation, be advised to come to the office on Wednesday, September 16, for an interview, and to bring with him all documents pertaining to the transaction. On Wednesday, September 16, 1964, Edward Walsh, one of counsel, and I interviewed Herbert Moses. I had no previous knowledge of the facts, and had not tried the case. As Moses related the story of the transaction which was the subject of the contempt citation, I dictated an affidavit and Edward Walsh dictated my phrasing into a Stenorette. Moses handed me three documents which were later introduced into evidence and marked as Exhibits C, D and E. After reading the documents, I told Moses that copies of the documents should be attached to the affidavit and the originals should be offered at the time of the hearing. Moses objected, stating that he did not wish to disclose his prices. This seemed reasonable and I advised him that the price of the sale was not material to any issue on the Order to Show Cause at this time but the originals should be brought to court. A stenographer in the office advised us that she could make

xerox copies of the documents and cover up the prices with a piece of paper so that the machine would not reproduce the prices on the copies. Prices are always present in such documents and the absence of prices in the xerox copies would be obvious. If the prices ever became material, I planned to have the originals with me which could be disclosed to the court on request.

My time card shows that only two hours were spent on this matter. I did not personally supervise typing of the affidavit nor the preparation of the xerox copies which were attached. I did state to Moses that the prices could be deleted from the xerox copies because of the confidential nature of prices. I did not direct that any other writing be deleted from xerox copies and I did not know that the handwritten notation on the purchase order (Ex. E) had been deleted until I appeared in court. A temporary secretarial employee prepared the affidavit and xerox copies which were attached. I did not see the affidavit before it was served.

At the conference between Moses, Walsh and me, no one suggested that anything be blanked out except the prices. Any other omission was as much a surprise to me as to anyone in the courtroom.

At the oral argument in the federal district court on September 21, 1964, the attorney for the plaintiff called the court's attention to obvious deletion of the prices [pp. 978-979, R.T.]. I had the originals in the file. I immediately produced the original records, offered them as exhibits and offered Moses as a witness. Moses had not been subpoenaed but I had arranged that he be present at the time of the hearing.

This subject (of the deleted prices) was never mentioned again during the oral hearing before the district court, by counsel or by the Judge. It was not mentioned in the findings by the trial judge, nor was it

mentioned by the attorney for the plaintiff in his briefs or in oral argument before this court, nor by this court at the oral hearing.

I have never been asked to state the facts which led to the preparation of the affidavit and can only partially relate the entire details of the preparation of the affidavit at this time as I do not know them of my own knowledge. It was a surprise to me to read the decision and order of this court which questioned my good faith in the preparation of the affidavit. I request that before this court judges me, I be notified of a charge and be given the right to defend myself.

HAMER H. JAMIESON,

Subscribed and sworn to before me this 9th day of December, 1965.

FLORA E. WILSON
Notary Public, State of California Principal Office-Los Angeles County.

No. 19798

IN THE UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT

FLOYD L. CROWDER, individually and
doing business as CROWDER & SON,

Appellant

v.

UNITED STATES OF AMERICA,

Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE NORTHERN DISTRICT OF
CALIFORNIA

BRIEF FOR APPELLEE

JOHN W. DOUGLAS,
Assistant Attorney General,

CECIL F. POOLE,
United States Attorney,

DAVID L. ROSE,
J. F. BISHOP,
Attorneys,
Department of Justice,
Washington, D.C., 20530.

I N D E X

CITATIONS

ses:

Cases--Continued: Page

Statutes and Contractual Provision:

IN THE UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT

No. 19798

FLOYD L. CROWDER, individually and
doing business as CROWDER & SON,

Appellant

v.

UNITED STATES OF AMERICA,

Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE NORTHERN DISTRICT OF
CALIFORNIA

BRIEF FOR APPELLEE

JURISDICTIONAL STATEMENT

This action was brought by appellant in the United States
rict Court for the Northern District of California, pursuant
3 U.S.C. 1346(a), for damages in the sum of $8,596, allegedly
on its building rehabilitation contract with the United
es (R. 1-3)[1/], which contained a standard Government disputes

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"R." refers to the portion of the record reproduced by the
of this Court.
"App." refers to the appendix attached to this brief.

clause committing all factual disputes to administrative determination. Appellant's claim was denied initially by the contracting officer and, upon administrative appeal, by the Armed Services Board of Contract Appeals (App. 1b-3b). The district court granted appellee's motion for summary judgment, on the basis of the administrative record and findings (R. 19-23) and, on November 2, 1964, entered judgment for appellee (R. 24). Appellant, on November 12, 1964, filed notice of appeal (R. 27). The jurisdiction of this Court is invoked under 28 U.S.C. 1291.

COUNTERSTATEMENT OF THE CASE

Appellant's claim is based upon the contention that his contract with the Government for building rehabilitation work at McClellan Air Force Base did not require certain painting, sandblasting, and glass replacement work, in a building designated in the contract as "Bldg. 475," and that he is therefore entitled to additional compensation in the amount of $8,596 for that work.

The contract, dated August 30, 1962, provided for painting, repairing steam lines and re-roofing various buildings at McClellan Air Force Base, California, at a price of $106,726. The work was to be done in accordance with the contract's attached provisions, plans and specifications (App. 1b).

Section II of the specifications provided in Paragraph T1-C3,

oject Requirements, sub-paragraph j, as follows (R. 22):

> Building 475: Whip sandblast all concrete surfaces prior to repainting; paint entire exterior surfaces including metal dust collectors, ducts and other metal work except cement asbestos shingle siding; roof ventilators where shown on drawings are to be painted; replace in kind broken window panes; re-putty window panes as necessary, replace in kind damaged cement asbestos shingles. In building 475E, which is a portion of building 475, replace 19 space heaters, valves, strainers, traps and fillings as shown on drawings.

Sheet 4 of the drawings attached to the contract embodied a p showing an outline designated "Roof Building 475." The map picted an irregularly shaped building divided into sections. large section of the building was separately labeled "Bldg. 475." her, smaller areas of the building were labeled "475A," "475B," 75C," "475D" and "475E." On this map there also appeared mbols indicating particular kinds and location of items to be rked upon, e.g., roof ventilators. Such symbols appeared not ly on parts of the building map marked with letters, i.e., 75A" through "475E," but also on the portion separately marked ldg. 475," thus indicating that the work was to be performed all sections of the building (App. 3b, 4b-5b).

The same Sheet 4 also set forth a paint schedule showing e nature of the surfaces to be painted and the paint to be

applied, including the following table (App. 2b):

Proj. No.	Bldg. No.	Room or Area
* * * * * * *		
112-2	475	Complete Exterior of Bldgs. 475, 475A, 475B, 475C, 475D & 475E 2/

Section II of the specifications, provided (App. 2b):

> T1-01 SCOPE: The work consists of the rehabilitation of buildings. Principal features of the work are noted in this section of the specifications. Work not specifically noted herein, but otherwise shown on the drawings, shall be performed by the Contractor at no additional cost to the Government. * * *

Appellant, by letter dated October 15, 1962, presented the claim that the area above referred to as "Bldg. 475" in the contract was not included in the contract, for resolution pursu to the disputes clause of the contract. The contracting office

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2/ Appellant repeatedly errs in stating or paraphrasing the contractual listing of areas as if it excluded the designation "475" as a designation separate from "475A" through "475E." Compare, e.g., the contract's language above: "Bldgs. 475, 475 475B, 475C, 475D & 475E" (App. 2b) with appellant's statement i the complaint: "contract references were to Building 475, area 475A, 475B, 475C, 475D and 475E" (R. 3). And see appellant's language at R. 2, and his brief at pp. 3, 7, 33-34.

Appellant's repeated references to the area here in quest as "475F," without authority therefor in the contract but rathe in his own reliance upon exterior building signs, also tends t obscure the facts. E.g., R. 2-3, 32; Appt. Br. 6, 8-9, 11, 14 19, 23, 31. Compare also appellant's unsupported statement, "Building E is not a portion of Building 475" (Appt. Br. 20) w the actual statement in the contract: "building 475E, which i portion of Building 475" (R. 22).

.etter dated November 14, 1962, rejected appellant's claim. suant to that clause, appellant prosecuted an administrative eal to the Armed Services Board of Contract Appeals, and by pulation, submitted the matter upon the contract and written dence, without testimony.

The Board also rejected appellant's claim. The Board found the section of Building 475 which was designated as "475" the contract actually bore signs on its exterior as "475F" . 3b). There was no mention in the specifications or drawings ny building "475F." The Board concluded that appellant's tention that that portion bearing signs of "475F" was not uded in the work disregarded "the clear indication of that ion of the building in the drawings, and its listing as a rate entity in the Paint Schedule and diagram in sheet 4 he drawings" (App. 3b).

The Board further found that the area 475 was "clearly n" and that if there was question concerning it, appellant on notice of a matter that would be decided by the contracting cer (App. 3b).

Appellant brought this action in the district court upon his m, asserting, inter alia, that the decision of the Board was supported by substantial evidence (R. 3). The administrative rd, including the contract and the Board decision, were oduced by stipulation (R. 9-10). The Government moved for

summary judgment, on the basis of the administrative record and findings (R. 11-12). The district court treated the issue prese as one of law and, after an analysis of the pertinent portion of the contract specifications and drawings, ruled that the cont was free of ambiguity, and that "by the plain and clear words of the contract [appellant] was bound to perform the work he actual did perform on building 475 (R. 23)." Accordingly, the court granted the Government's motion, and entered judgment for the Government and against appellant (R. 24).

STATUTE AND CONTRACTUAL PROVISION INVOLVED

1. The Act of May 11, 1954, (called the "Wunderlich Act") c. 199, Secs. 1-2, 68 Stat. 81, 41 U.S.C. 321-322, provides as follows:

> 41 U.S.C. 321:
>
> No provision of any contract entered into by the United States, relating to the finality or conclusiveness of any decision of the head of any department or agency or his duly authorized representative or board in a dispute involving a question arising under such contract, shall be pleaded in any suit now filed or to be filed as limiting judicial review of any such decision to cases where fraud by such official or his said representative or board is alleged: Provided, however, That any such decision shall be final and conclusive unless the same is fraudulent or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or is not supported by substantial evidence.

41 U.S.C. 322:

> No Government contract shall contain a provision making final on a question of law the decision of any administrative official, representative, or board.

2. The standard disputes clause, General Provisions, ndard Form 23-A, clause 6 (April 1961 ed.), provides in tinent part (41 CFR Sec. 1-16.401(g), 16.901-23A):

> (a) Except as otherwise provided in this contract, any dispute concerning a question of fact arising under this contract which is not disposed of by agreement shall be decided by the Contracting Officer, who shall reduce his decision to writing and mail or otherwise furnish a copy thereof to the Contractor. The decision of the Contracting Officer shall be final and conclusive unless, within 30 days from the date of receipt of such copy, the Contractor mails or otherwise furnishes to the Contracting Officer a written appeal addressed to the head of the agency involved. The decision of the head of the agency or his duly authorized representative for the determination of such appeals shall be final and conclusive. This provision shall not be pleaded in any suit involving a question of fact arising under this contract as limiting judicial review of any such decision to cases where fraud by such official or his representative or board is alleged: Provided, however, that any such decision shall be final and conclusive unless the same is fraudulent or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith or is not supported by substantial evidence. In connection with any appeal proceeding under this clause, the Contractor shall be afforded an opportunity to be heard and to offer

evidence in support of his appeal. Pending final decision of a dispute hereunder, the Contractor shall proceed diligently with the performance of the contract and in accordance with the Contracting Officer's decision.

(b) This Disputes clause does not preclude consideration of questions of law in connection with decisions provided for in paragraph (a) above. Nothing in this contract, however, shall be construed as making final the decision of any administrative official, representative, or board on a question of law.

COUNTERSTATEMENT OF QUESTION PRESENTED

Where contractual specifications and drawings require the ntractor to perform rehabilitation work on all six sections of building, including a section designated "475," is the contractor titled to extra compensation for doing the work on the six ctions of that building, because the section designated as "475" the specifications and drawings bore signs on its exterior ading "475F"?

ARGUMENT

INTRODUCTION

The contract involved here called for rehabilitation work be done on various buildings at McClellan Air Force Base, cluding all six sections of Building 475, which were designated the specifications and drawings as "Bldgs. 475, 475A, 475B, 5C, 475D & 475E" (App. 2b, 4b-5b). Appellant's claim is that e contract only required him to perform work on five of the ctions, because the section identified as "Bldg. 475" in the ecifications and drawings bore signs reading "Bldg. 475F" on s exterior. Accordingly, he reasons, the contract only required m to work on sections "475A" through "475E," and he is entitled additional compensation for his work on the sixth section.

The Armed Services Board of Contract Appeals, which was signated as the arbiter of factual disputes by the standard

disputes clause of the contract, recognized that the section designated "475" in the contract was "in fact marked as 475F by signs on its exterior," but denied the claim on the ground that the drawings and specifications clearly indicated that the work of the contract included work on that section (App. 3b). Treating the issue of the meaning of the specifications and drawings as one of law for its independent evaluation, the district court agreed with the Board that the contract required the work to be performed on all six sections of the building, and dismisse the complaint.

Appellant's principal contention in this Court, as we understand it, is that he was entitled to a judicial trial de nov to determine the intent of the parties in regard to the specifica tions and drawings, because the Board made no specific finding on that issue (Br. 16-31). Alternatively, appellant appears to argu that his construction of the contract (i.e., that it required wor on only five sections of the building) is correct as a matter of law (Br. 32-38).

We show first that the standard disputes clause makes the Board the arbiter of factual disputes, and that judicial proceedings under the Wunderlich Act are limited to a review of the Board findings on the administrative record. United States v. Carlo Bianchi & Co., 373 U.S. 709. Accordingly, there would be n occasion for a trial in the district court even if the administra tive findings were inadequate. However, we show that the Board

olved the critical issue of what sections of the building e covered by the specifications and drawings, and since its dings are supported by substantial evidence, these findings binding and are dispositive of appellant's claim.

If the issue of the meaning of the contract's specifications drawings is treated as one of law, the appellant is in no ter position on his contention concerning a trial de novo in district court. For a party is obviously not entitled to roduce evidence on an issue of law. And, as both the Board the district court ruled, the drawings and specifications arly required that work be performed on all six sections of building. Accordingly, appellant was not entitled to additional pensation for doing the work on the sixth section, and the trict court properly granted judgment denying his claim.

THE ARMED SERVICES BOARD OF CONTRACT APPEALS AND THE DISTRICT COURT PROPERLY DENIED APPELLANT'S CLAIM FOR ADDITIONAL COMPENSATION BASED ON HIS WORK ON A SECTION OF BUILDING 475, SINCE THE CONTRACT'S SPECIFICATIONS AND DRAWINGS REQUIRED THE APPELLANT TO PERFORM THE CONTRACTUAL WORK ON ALL SIX SECTIONS OF THAT BUILDING

A. The Specifications and Drawings Required the Contractor to Perform the Contractual Work on All Six Sections of Building 475.

1. The contract, as demonstrated in greater detail in our nterstatement supra, clearly required the contractor to perform

the painting and other rehabilitation work contemplated by the contract on all six sections of Building 475. In the map on Sheet 4 of the drawings (App. 4b-5b), six sections were depicted section specifically designated "Bldg. 475" and further sections respectively designated "Bldg. 475A," "Bldg. 475B," "Bldg. 475C, "Bldg. 475D," and "Bldg. 475E." The same plan of designation wa followed in the schedule, also appearing on the drawing sheet. There the project was identified by its number, "112-2," the bui ing was generally identified, under a heading "Bldg. No.," as "4 and under the separate heading "Room or Area" the areas were lis in accord with the map, as follows: "Bldgs. 475, 475A, 475B, 47 475D & 475E." Had there been any intent to exclude the "475" ar of the building, the separate designation "475" would have had t be excluded from the above list, as also from the map, for it served no purpose of general identification of the building, suc identification having already been made under the heading of "Bldg. No." The only possible purpose of the designation "475" under "Room or Area" was thus to refer to the area, marked "475" on the drawing, as an area <u>in addition to</u> those designated "475A through "475E." As the Board noted, the designation "475" "coul refer only to all parts of the building or to the part marked 47 [by exterior signs]. In either case, it was included in the

ntract" (App. 3b).[3/]

Appellant's theory, in essence, is that the precise designa-
ons of the contract's specifications and drawings are to be
pplanted by general designations of the respective sections of
e buildings to be adduced by appellant from certain signs
ppearing on the outside of the buildings. The portion of the
ilding designated in the contract as "475" bore some signs
rked "475F." The short answer, of course, is that the contract
lled for work to be done upon all six sections of the building
s prescribed in a precise map of the areas contemplated and in
eference to these areas by the numbers employed in the map. At
point in the contract was there any sanction of the use of
igns on buildings as a proper or feasible means of showing where
ork was to be done. And at no point in common experience is
ere authority for a contract bidder to ignore a contract's
recise system of designating an area and to resort instead to
xtrinsic nomenclature, particularly in such a case as here, where
e portion of the building bearing signs reading "475F" was
oncededly the section "475" delineated by the map and specified

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3/ Appellant's contention that there would be no "necessity"
or any designation of Building 475 (Appt. Br. 7, 9, 12, 13) is
eaningless. The contention patently overlooks the form of the
ontract which first provided the general location of a building
r group of buildings--e.g. Sheet 2 (R. 22) and the heading
Bldg. No." (App. 2b)--and then specified, under the heading
Room or Area" the specific areas or buildings to be covered,
ere specifying "475" as an area separate from and additional
further areas identified by capital letters (App. 2b).

by corresponding number in the contract provisions as the area on which work was required to be performed.

Having agreed to perform the contractual work on all six sections of Building 475, appellant is not entitled to compensation in addition to the contract price for doing so. The fact that one of those sections was designated as "475" in the specifications and drawings, but as "475F" by exterior signs, did not reduce the number of sections covered by the contract from six to five.[4/]

2. The district court here believed that the issue of the proper construction of the specifications and drawings was one of law, on which it would not be bound by the Board's decision. In our view, an issue as to the proper construction of contractual specifications and drawings is an issue of fact, to be resolved by the Board pursuant to the standard disputes clause, particularly where, as here, the contractor introduces extrinsic evidence as to the intent of the parties. United States v. McKinnon, 289 F. 2d 908 (C.A. 9); Lowell O. West Lumber Sales v. United States,

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4/ Appellant's repeated statements to the effect that "the government" demanded work on an area "designated by them" as "area 475F" (Appt. Br. 4 and again at pp. 6, 11, 13, 15, 19, 28, 30) is not supported by citation to the record. Our examination of the first letter of the Government appearing in the record, the letter of the contracting officer dated November 14, 1962, indicates that this letter in referring to section F is merely referring to and adopting appellant's language, which apparently first appeared in appellant's letter of October 15, 1962. We do not find in the record any original use by the Government, or any adoption of, the designation "F" as the Government's own term in its demand for completion of the work. Moreover, such use would not have been dispositive of the instant issue as it would have indicated, at most, a use of a handy additional designation, but assuredly no agreement that this was the only possible designation of the area or that such use was to effect a change in the contractual designation.

70 F. 2d 12 (C.A. 9); Allied Paint & Color Works v. United States, 09 F. 2d 133, 137 (C.A. 2); Gottlieb Contracting, Inc. v. United tates, (C.A. 2, No. 30002, decided December 2, 1965). And, since he Board findings are supported by the substantial evidence of he specifications and drawings themselves, the findings are binding on the parties. 41 U.S.C. 321, supra, p. 6 ; United States . McKinnon, supra.[5/]

Nothing turns, however, upon whether such issues are factual or legal. For here there is no real dispute about the meaning of the contractual specifications and drawings. The meaning attributed to them by the Board and the district court was clearly the proper one. For, as we have shown above, the specifications and drawings clearly required that the rehabilitation work of the contract be performed on all six sections of Building 475, including that section designated "475" in the drawings and specifications. Appellant does not challenge this requirement, nor does he dispute the fact that the section so designated was in fact the same section which bore signs reading "475F." He argues instead that he should receive additional compensation for painting that section, because it was not designated as "475F" either in the specifications

5/ The district court decision relied upon by appellant in this connection (App. Br. 18), i.e. Bangor Roofing & Sheet Metal Co. v. Cunningham, 141 F. Supp. 205 (D. Me.), was vacated and remanded on appeal, 241 F. 2d 811, C.A. 1. In Bangor, the effect of the Wunderlich Act was held to be restricted to limitation of contract provisions and not to apply to other statutes, such as the statute authorizing the Comptroller General to conclusively determine certain facts. (241 F. 2d 811 at 816).

or in the drawings. Appellant's contention fails as a matter of law, however, because the contract clearly required him to perfor the rehabilitation work on all six sections of the building, howe designated.

B. The District Court Properly Granted Judgment on the Administrative Record, Because the Relevant Factual Issues Were Resolved by the Armed Services Board of Contract Appeals, and Its Findings Preclude Recovery by Appellant.

Appellant contends that the district court erred in entering summary judgment for the Government because there were unresolved factual issues which should be determined in a judicial trial (Appt. Br. 17). He seeks the right to show "factually," "by evidence not considered by the Board" the "true intent of the contracting parties" (Appt. Br. 10, 13, 16-18). In so doing, he misconceives the nature of the judicial function in cases contain standard "disputes" clauses and an administrative record and findings. For such clauses make the administrative tribunals the arbiters of all factual disputes arising under the contract, and it is clear that the judicial function in such cases is limited to a review on the administrative record. United States v. Carlo Bianchi Co., 373 U.S. 709, 714. Thus, even if the Armed Services Board of Contract Appeals had failed to render complete findings, the appropriate remedy would be to remand the matter to the Board not to hold a judicial trial. 373 U.S. at 717-718. Appellant wa allowed to present all the evidence he wished to the Board. He

nose, by stipulation, to submit the matter upon documentary vidence only (App. 1b). Having had one evidentiary hearing at hich he introduced all the evidence he wished to present, he is ot entitled to another evidentiary hearing because he was nsuccessful in his first attempt.[6/] United States v. Carlo ianchi, supra, 373 U.S. at 716-717; Allied Paint & Color Works . United States, 309 F. 2d 133, 138 (C.A. 2), certiorari denied, 75 U.S. 813.

There was, however, no defect in the Board's findings here. or the Board found that the section of Building 475 described as Bldg. 475" in the specifications and drawings was the same section s that described as "475F" by exterior signs, but that those pecifications and drawings clearly indicated that the contract ork was to be performed on that section, as well as on the other ive sections of that building (App. 3b). Since the Board ruled hat the specifications and drawings of the contract clearly equired appellant to perform the work in issue, it had no ccasion to make any finding as to the subjective intent of the ontracting parties. Accordingly, the Board's findings provided

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6/ Even the Court of Claims, which has traditionally construed he disputes clause narrowly (See, Silverman v. United States, 24 F. 2d 287, 289 (C.A. 1)), has, since the Bianchi decision, uled that factual disputes as to the intent of the parties ust be resolved on the administrative record, and not by vidence taken at a judicial trial. Morrison-Knudson v. United tates, 345 F. 2d 833, 836, 837 (Ct. Cl.).

an adequate basis for the granting of judgment denying appellant's claim.

CONCLUSION

For the foregoing reasons, we submit that the judgment of the district court should be affirmed.

JOHN W. DOUGLAS,
Assistant Attorney General,

CECIL F. POOLE,
United States Attorney,

DAVID L. ROSE,
J. F. BISHOP,
Attorneys,
Department of Justice,
Washington, D.C., 20530.

DECEMBER 1965

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

J F Bishop

J. F. BISHOP
Attorney, Department of Justice,
Washington, D.C., 20530.

A P P E N D I X

APPENDIX

DECISION OF ARMED SERVICES BOARD
OF CONTRACT APPEALS
(caption and appearances omitted)

OPINION BY MR. SADTLER

This is a claim for extra painting and glass replacement a building rehabilitation contract. Appellant states that e work alleged to have been outside of the scope of the ntract cost $8,601.00. The parties have stipulated to submit e appeal on the record without an oral hearing, and have not led briefs.

The contract, dated 30 August 1962, is for painting, repair-g steam lines and re-roofing various buildings at McClellan Air rce Base, California at a price of $106,726.00. The work was be done in accordance with attached provisions, plans and ecifications, including Standard Form 23A, General Provisions. e question to be determined is whether Section F of Building . 475 was included in the contract. Appellant, by letter of October 1962, presented the claim of the subcontractor that is area was not included. The contracting officer determined his letter of 14 November 1962 that it was, and a timely peal was taken on 7 December 1962. It was followed by a more tailed letter of 5 January 1963.

The Unit Price Schedule of appellant's bid became the hedule of Items of the contract. Item 23a states the work volved in this appeal, as follows:

	Quantity	Unit	Unit Price	Amount
		* * * * * *		
3. Building 475				
a. Painting	1	Job	Lump Sum	$10,400.00"

* * * * * *

Section I of the specifications covers "Project Provisions." ›agraph P-03, "Drawings", includes subparagraph b:

"b. The specifications and drawings which form a part of this contract are integral. Work shown on one, although not shown on the other, shall be executed as though shown on both. Should specifications and drawings conflict, the specifications shall govern. Any doubt that may arise as to the intent and purpose of the specifications and drawings, shall be referred to the Contracting Officer."

Section II of the specifications is the Technical Provisions. ›agraph T1-01 provides:

"T1-01 SCOPE: The work consists of the rehabilitation of buildings. Principal features of the work are noted in this section of the specifications. Work not specifically noted herein, but otherwise shown on the drawings, shall be performed by the Contractor at no additional cost to the Government. In general the work includes interior and exterior painting; reroofing; replacing space heaters; steam and condensate lines, pressure reducing valves, fittings, traps, insulation, etc., on heating systems; and other related maintenance work."

Paragraph T1-02 states that the work is divided into ten ›jects, and lists them. Project j, entitled SMA-112-2, is uilding 475, permanent construction; 238,646 sq. ft."

Paragraph T1-03 sets forth the project requirements. For ›ject j. the work is described only as on "Building 475", though it is further specified that certain heating equipment ll be replaced "In Building 475E, which is a portion of ilding 475 . . . ."

Sheets 2 and 4 of the drawings are relevant. Sheet 2 is a ilding Location Plan. It shows an outline designated 475, t no letters in connection with it. Sheet 4, "Painting" cludes a Paint Schedule for various projects and buildings, owing the nature of the surfaces to be painted and the paint be applied. Building 475 is identified as follows:

"Proj. No.	Bldg. No.	Room or Area
* * * * * * * *		
112-2	475	Complete Exterior of Bldgs. 475, 475A, 475B, 475C, 475D & 475E"

On this sheet there also appears a diagram entitled "Roof ı.lding 475", showing an irregularly shaped building divided ;o sections. The largest is marked "Bldg. 475", and the others ldg. 475A" to "Bldg. 475E." This diagram is accompanied by a gend showing signs which indicate the kind and location of work be done. These signs are placed at appropriate locations on l parts of the building diagram, including that marked "Bldg. 5."

There is no mention in the specifications or drawing of any ch building as Building 475F. The pleadings filed by the parties ow, however, that the section designated 475 is in fact marked as 5F by signs on its exterior. Appellant's claim is that, since 5F is not specified in the contract, it is not included in the rk. This contention, however, would disregard the clear indition of that portion of the building on the drawings, and its sting as a separate entity in the Paint Schedule and diagram in eet 4 of the drawings. It is listed as 475 instead of 475F, but is clearly shown. Paragraph P-03b of the drawings requires that e work be performed. If there is no building properly known as 5, then appellant was put on notice by that paragraph of a conict to be referred to the contracting officer. That number could fer only to all parts of building 475 or to the part marked 475F. either case it was included in the contract. If it were not, e reference is meaningless.

The appeal is denied.

Dated 6 May 1963.

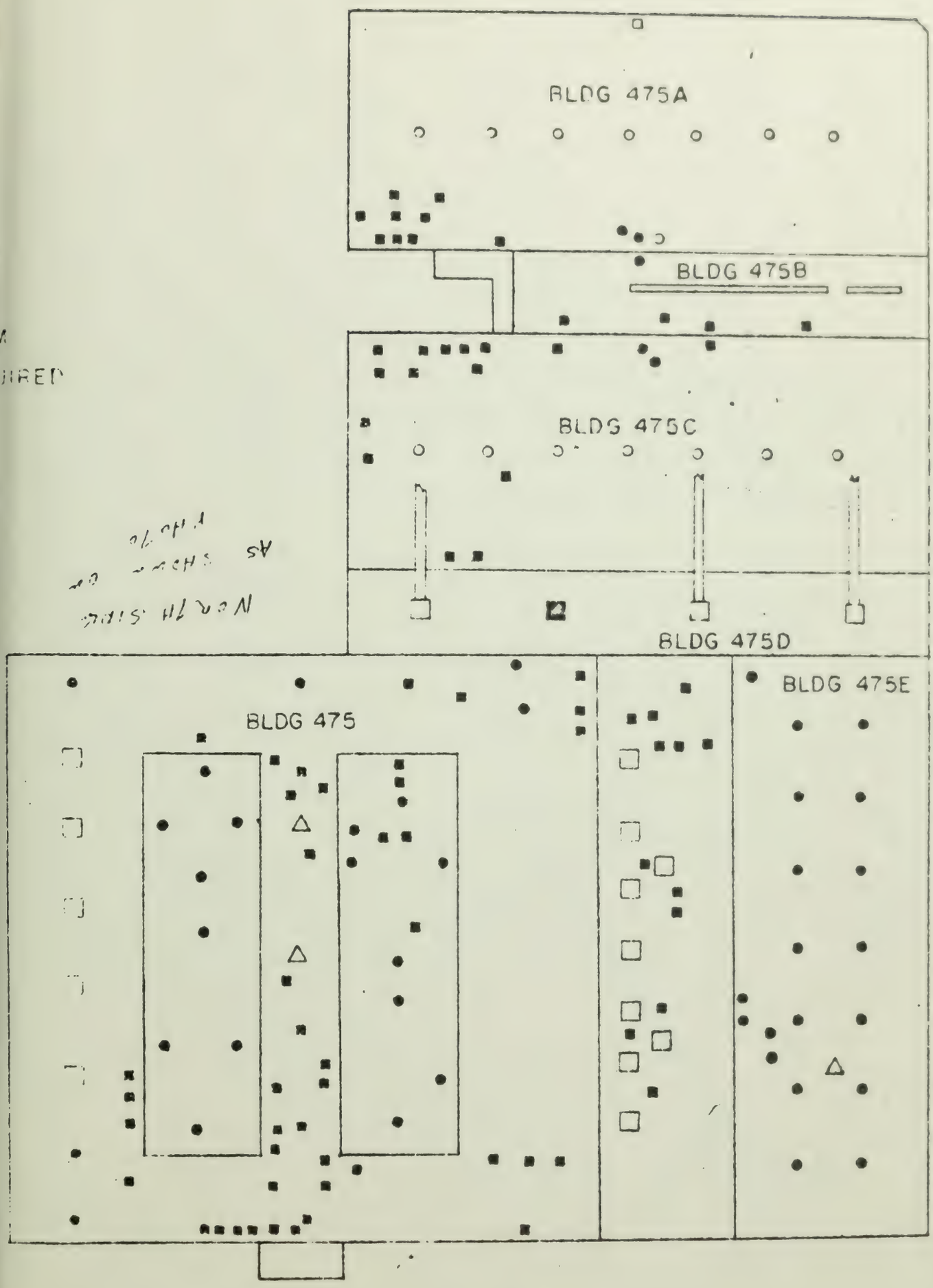
/s/ Leander R. Sadtler
LEANDER R. SADTLER
Member of Division No. 8,
Armed Services Board of Contract Appeals

concur

/ George W. Crawford
ORGE W. CRAWFORD, Vice Chairman
med Services Board of Contract
peals and Member of Division
. 8

I concur

/s/ Seward H. Bowers
SEWARD H. BOWERS
Member of Division No. 8,
Armed Services Board of Contract Appeals

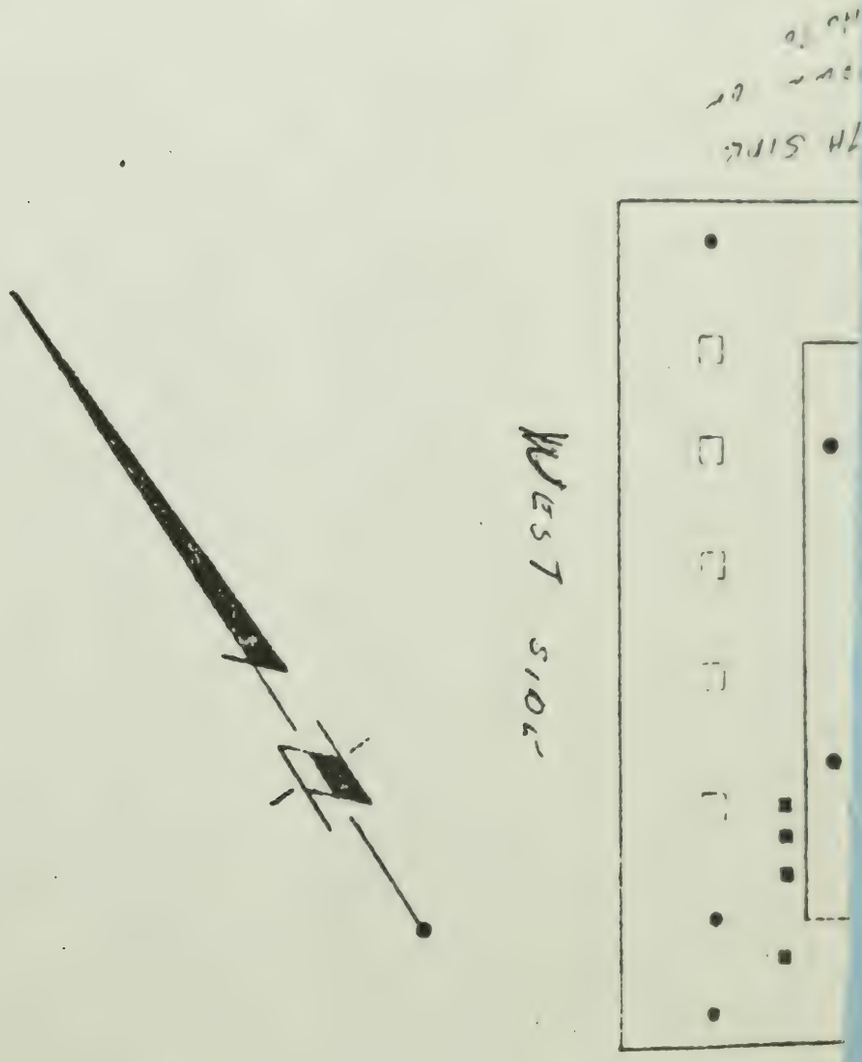


SOUTH SIDE
AS SHOWN ON
PHOTOS
-4b-

LDING 475

LEGEND

- □ BLOWER, NO PAINTING REQUIRED
- ■ BLOWER TO BE PAINTED ALUMINUM
- ○ VENTILATOR, NO PAINTING REQUIRED
- ● VENTILATOR TO BE PAINTED ALUMINUM
- ▣ EQUIPMENT BUILDING TO BE PAINTED ALUMINUM
- ⊡ EQUIPMENT BUILDING & DUCT, NO PAINTING REQUIRED
- △ EVAPORATIVE COOLER, NO PAINTING REQUIRED



No. 19,803

In the United States Court of Appeals for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

GOLDEN STATE BOTTLING COMPANY, INC. d/b/a PEPSI-COLA BOTTLING COMPANY OF SACRAMENTO, RESPONDENT

On Petition for Enforcement of an Order of the National Labor Relations Board

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN SUPPORT OF ITS PETITION FOR REHEARING

ARNOLD ORDMAN,
General Counsel,

DOMINICK L. MANOLI,
Associate General Counsel,

MARCEL MALLET-PREVOST,
Assistant General Counsel,

ELLIOTT MOORE,
Attorney,

National Labor Relations Board.

In the United States Court of Appeals
for the Ninth Circuit

No. 19,803

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

GOLDEN STATE BOTTLING COMPANY, INC. d/b/a PEPSI-COLA BOTTLING COMPANY OF SACRAMENTO, RESPONDENT

On Petition for Enforcement of an Order of the National Labor Relations Board

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN SUPPORT OF ITS PETITION FOR REHEARING

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1. On December 23, 1965, the Board filed its petition for rehearing requesting the Court to remand this case to the Board on the lockout issue, to allow the Board to consider the impact of the Supreme Court's decision in *American Ship Building Co.* v. *N.L.R.B.*, 380 U.S. 300.[1] On January 7, 1966, this

[1] In its decision of December 2, 1965, the Court sustained the Board's findings that the Company unlawfully discharged employee Baker, and unlawfully dominated the administration of the independent union (P.C.B.C.E.). The Court, however, set aside the Board's finding that the Company violated the Act by locking out its employees in order to force them to accept its contract terms.

Court issued an order denying the petition, but this order was vacated on April 5, 1966, with leave to file briefs.

As noted in the petition for rehearing, the Board's prior decision, rendered before *American Ship*, rested on the premise that a bargaining lockout was *per se* unlawful. Therefore, the Board did not deem it necessary to make a finding as to the Company's motivation for locking out the employees. In short, as this Court stated, no finding was made as to the existence of "the proscribed intent or necessary destruction of the union's capacity for responsible and effective representation" (slip op., p. 5). However, the holding in *American Ship* makes plain that, if such a finding of illegal motivation can be made, the lockout here would still be violative of the Act. We urged in our petition for rehearing that the initial determination of this question of motivation should properly be made by the Board, and that thus the case should be remanded for that purpose.

We submit that the Supreme Court's recent action in *Newspaper Drivers* v. *Detroit Newspaper Publishers*, 382 U.S. 374, confirms the propriety of this procedure. There, as here, the Board, prior to *American Ship*, found that a bargaining lockout was violative of the Act without regard to motivation. The Sixth Circuit, relying on *American Ship*, denied enforcement on the ground that "under the undisputed facts in this case a violation of Sections 8(a)(1) and 8(a)(3) could not be supported." *Detroit Newspaper Publishers Assn.* v. *N.L.R.B.*, 346 F. 2d 527, 530. The Supreme Court reversed, *per curiam*, and re-

manded the case to the Board for further consideration in the light of *American Ship*. In sum, the action of the Supreme Court in *Detroit Newspaper* shows that, in its view, the application of *American Ship* to differing lockout situations is a complex matter which should be passed on by the Board initially.[2] See also *N.L.R.B.* v. *Darlington Mfg. Co.*, 380 U.S. 263, 277; *N.L.R.B.* v. *Ford Motor Co.*, 305 U.S. 364, 373; *F.T.C.* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 145; *Texas Co.* v. *N.L.R.B.*, 120 F. 2d 186, 190-191 (C.A. 9).

2. In its original decision, the Court also denied enforcement of paragraph 1(d) of the Board's order, which required the Company to cease giving effect to the contract with the illegally assisted union, P.C.B.C.E. The Court did so because it found an apparent inconsistency between that prohibition and the proviso thereto, which read:

> *Provided, however*, that nothing herein shall be construed to require the Respondent to vary any substantive provision of such agreement, or to prejudice the assertion by the employees of any rights they have thereunder.

We submit that the provisions are not inconsistent; their purpose is to effectuate the withdrawal of recognition from the P.C.B.C.E., for an appropriate time, without at the same time prejudicing the employees

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[2] In *N.L.R.B.* v. *Tonkin Corp. of California*, No. 19714, decided November 10, 1965, another division of this Court remanded to the Board a lockout issue similar to that here. The Tenth Circuit followed the same course in *N.L.R.B.* v. *American Stores*, 60 LRRM 2128, September 16, 1965.

by requiring the Company to change the existing level of wages and other conditions of employment (which, though they may originally have been established by the contract, are no longer necessarily dependent on the contract). Accordingly, if, as the Court found, paragraph 1(d) is ambiguous, we submit that, instead of setting aside that paragraph, the more appropriate course would be to remand it to the Board for clarification.

CONCLUSION

For the reasons stated, it is respectfully submitted that the Board's petition for rehearing should be granted, and that both the lockout and the contract questions should be remanded to the Board.

Respectfully submitted,

MARCEL MALLET-PREVOST
Assistant General Counsel
National Labor Relations Board.

April 1966

CERTIFICATE

The undersigned certifies that he has examined the provisions of Rules 18 and 19 of this Court, and in his opinion the tendered brief conforms to all requirements.

MARCEL MALLET-PREVOST
Assistant General Counsel
National Labor Relations Board.

☆ U. S. GOVERNMENT PRINTING OFFICE; 1966 214149 742

No. 19,803

In the United States Court of Appeals for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

GOLDEN STATE BOTTLING COMPANY, INC. d/b/a PEPSI-COLA BOTTLING COMPANY OF SACRAMENTO, RESPONDENT

On Petition for Enforcement of An Order of the National Labor Relations Board

PETITION FOR REHEARING

ARNOLD ORDMAN,
General Counsel,

DOMINICK L. MANOLI,
Associate General Counsel,

MARCEL MALLET-PREVOST,
Assistant General Counsel,

ELLIOTT MOORE,
Attorney,

National Labor Relations Board.

In the United States Court of Appeals for the Ninth Circuit

No. 19,803

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

GOLDEN STATE BOTTLING COMPANY, INC. d/b/a PEPSI-COLA BOTTLING COMPANY OF SACRAMENTO, RESPONDENT

On Petition for Enforcement of An Order of the National Labor Relations Board

---

PETITION FOR REHEARING

---

1. In its decision of December 2, 1965, a division of the Court (Circuit Judges Chambers and Koelsch, and District Judge Thompson) sustained the Board's findings that respondent unlawfully discharged employee Baker, and unlawfully dominated the administration of the Independent Union (P.C.B.C.E.). The Court, however, set aside the Board's finding that respondent had violated the Act by locking out its employees in order to force them to accept its contract

terms, holding that such action was privileged under the intervening decision of the Supreme Court in *American Ship Building Co.* v. *N.L.R.B.*, 380 U.S. 300. The Court also declined to enforce that portion of the Board's order (paragraph 1(d)) which bars respondent from giving effect to the contract with P.C.B.C.E., dated April 1, 1963.

2. The Court's action in setting aside the lockout finding is contrary to the action of another division of the Court (Circuit Judges Barnes and Hamley, and Senior District Judge Mathes) in *N.L.R.B.* v. *Tonkin Corporation of California*, No. 19714, decided November 10, 1965.[1] In that case, the facts of which are closely related to those here, the Court remanded the question of the legality of the lockout to the Board for further consideration in the light of *American Ship, supra.* We submit that this was the correct procedure, and that the same procedure should have been followed here.

Thus, *American Ship* merely holds that an employer may lawfully use a lockout, after an impasse in negotiations, to advance a legitimate bargaining position; it does not sanction the use of a lockout to further a course of illegal activity. Accordingly, even under *American Ship*, the lockout here would still be illegal if it were found that it was merely a means of implementing respondent's illegal efforts to dominate the administration of the Union. In its prior decision, rendered before *American Ship*, the Board did not

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[1] The respondent employer has filed a petition for rehearing in that case.

deem it necessary to make a finding as to the purpose of the lockout. Since *American Ship* has now made such a finding relevant, this Court—instead of assuming, as it did, that the lockout was divorced from respondent's other illegal activity—should have remanded the case to the Board so that it could determine, subject to later review by the Court, whether the record would warrant a finding that the lockout was illegally motivated.[2] As noted, this was the course followed in *Tonkin*, and such procedure was equally appropriate here.

---

[2] The record here shows that, *immediately* after announcing that the employees could not work without a contract, Schilling used the resultant confusion as occasion for an unlawful assault on the Union's integrity. The record also includes evidence that, prior to the lockout, Schilling told employees, in effect, that the Independent Union's bargaining committee was trying to "disrupt" the Company's operation by seeking a better contract and that the committeemen should find other jobs (R. 12; Tr. 17-18, 20-21, 162-167), and also directed the Union's secretary to take proxies from employees who did not intend to vote at the meeting called to consider the Company's contract offer (Tr. 116-117). We submit that on this evidence it is arguable that the lockout itself was part of a plan to "injure" the Union by interfering with its administration. Moreover, as this Court found (slip op., pp. 3, 4), Baker's subsequent discharge "was motivated by his past union activities on behalf of the Teamsters [the "March and April incidents"]" and this anti-Teamster motivation was directly related to the lockout by Schilling's contemporaneous remark that the Teamsters Union was "trying to get in" but "will never make it now (R. 13; Tr. 29). This would lend further support to the argument that Schilling's motivation in announcing that the employees could not work without a contract was unlawful.

3. The portion of the Board's order dealing with the contract between the Company and the Independent Union (Paragraph 1(d)) is intended to permit the Company to maintain working conditions now in effect while prohibiting it from treating them as contractually imposed. The purpose of this provision, which was not challenged by the Company (*Marshall Field & Co.* v. *N.L.R.B.*, 318 U.S. 253), is to effectuate the withdrawal of recognition from the Independent Union, for an appropriate time, without compelling the Company to withdraw benefits in the name of compliance with the Board's order. See, *National Licorice Co.* v. *N.L.R.B.*, 309 U.S. 350, 365; *J. I. Case* v. *N.L.R.B.*, 321 U.S. 332, 340-342; *I.L.G.W.U.* v. *N.L.R.B.*, 366 U.S. 731, 735, n. 7; *N.L.R.B.* v. *Wemyss*, 212 F. 2d 465, 472, 473-474 (C.A. 9); *Independent Stave Co., Inc.* v. *N.L.R.B.*, F. 2d (C.A. 8), November 10, 1965, 60 LRRM 2406, 2413, 52 L.C. Para. 16, 729. If, as the Court found (slip op., p. 6), paragraph 1(d) of the Board's order is ambiguous, we submit that the Court should have remanded that portion of the order to the Board for clarification, instead of denying enforcement and thereby permitting respondent to continue to maintain a contract which the Court found was obtained through unlawful means.

4. For these reasons, we submit that this Petition for Rehearing should be granted, and that the instant case should be remanded to the Board on the lockout and the contract issues noted above. Since the treatment of the lockout issue here is inconsistent with the

action of another division of the Court in *Tonkin*, it may be appropriate to have the matter considered by the Court *en banc*.

Respectfully submitted,

MARCEL MALLET-PREVOST
Assistant General Counsel
National Labor Relations Board

Dated at Washington, D.C.
this 21st day of December, 1965

CERTIFICATE OF COUNSEL

MARCEL MALLET-PREVOST, Assistant General Counsel of the National Labor Relations Board, certifies that he has read and knows the contents of the foregoing petition and that said petition is presented in good faith and not for purposes of delay.

MARCEL MALLET-PREVOST
Assistant General Counsel
National Labor Relations Board

December 1965

☆ U. S. GOVERNMENT PRINTING OFFICE; 1965 796867 411

No. 19803

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

GOLDEN STATE BOTTLING COMPANY, INC., d/b/a PEPSI-COLA BOTTLING COMPANY OF SACRAMENTO,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR REHEARING.

HILL, FARRER & BURRILL,
411 West Fifth Street,
Los Angeles, California,
Attorneys for Respondent.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

No. 19803

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

GOLDEN STATE BOTTLING COMPANY, INC., d/b/a PEPSI-COLA BOTTLING COMPANY OF SACRAMENTO,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR REHEARING.

To the Honorable, the Judges of the United States Court of Appeals for the Ninth Circuit:

1. Petitioner's brief merely resubmits the argument advanced previously to the effect that the cause should be remanded to the Board for a determination of the question "whether the record would warrant a finding that the lockout as illegally motivated and hence unlawful despite the intervening decision of the Supreme Court in *American Ship Building v. N.L.R.B.,* 340 U.S. 300." As this Court pointed out in its decision, the Board fully considered the question of Respondent's motivation when the cause was first before it and made extensive findings in that connection. This Court's de-

cision disagreed with those findings both as to factual import and legal effect. It properly concluded, as a consequence, that the lock-out, under the circumstances, did *not* constitute an unfair labor practice. The issue has been decided. There is patently no basis for this second attempt to secure another decision on the same question.

2. The decision of the Supreme Court in the case of *Newspaper Drivers v. Detroit Newspaper Publishers,* 382 U.S. 374, cited in Petitioner's Brief, in no way affects the validity of this Court's earlier decision herein. Neither does it afford any new ground for a reconsideration of matters already determined and settled. *Detroit Newspapers* involved a factual situation which placed it outside the stated scope of the rule enunciated in *American Ship Building.* In the latter case, an impasse had been reached between the employer and the Union, and the lock-out was utilized by the employer in support of its legitimate bargaining position. The *identical situation* to *American Ship* existed in the within cause, as this Court found. That is to say, the lock-out was resorted to only after an impasse had resulted, and in support of the employer's legitimate bargaining position in that context.

In *Detroit Newspapers,* the employer in question locked out its employees while negotiations were still in progress and before there was even any threat of impasse. The lock-out was admittedly resorted to in aid

of the bargaining position of *another* local newspaper *publisher* which had been struck by the same union. Admittedly, also, the two newspapers did not conduct bargaining on a multi-employer basis. (*Cf. N.L.R.B. v. Brown* (1965), 380 U.S. 278, 85 S. Ct. 980, 13 L. Ed. 2d 839). The case thus presented a situation not contemplated by the Court in *American Ship Building,* irrespective of motivation. The Supreme Court, therefore, clearly wished to afford to the Labor Board an opportunity to express its view of the matter, consonant with *American Ship Building,* before setting a new course in hitherto uncharted waters. These considerations are completely absent from the case at bar, which is on all fours with the substantive aspects of *American Ship Building,* as this Court has already correctly held.

3. With respect to Petitioner's request that this Court also remand to the Board for its reconsideration paragraph 1(d) of the Board's order, such request is patently without merit. What Petitioner is truly requesting is another chance for the Board to reconsider virtually all aspects of the case on which it was reversed. That issue was decided and resolved by this Court. There is no need for additional reconsideration. There must be an end to litigation.

Respondent therefore urges that the subject Petition be denied. If, however, the Court should be at all disposed to concur with Petitioner's view, Respondent

then requests that the matter be set down for hearing and oral argument upon the Court's motion calendar in order that Respondent be afforded an opportunity to be heard prior to ruling.

Respectfully submitted,

HILL, FARRER & BURRILL,
By M. B. JACKSON and
EDWIN H. FRANZEN,
Attorneys for Respondent.

Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

EDWIN H. FRANZEN

NO. 19826

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOHN WILLIAM WHALEY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

PETITION FOR REHEARING

APPEAL FROM
THE UNITED STATES COURT OF APPEALS
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

MANUEL L. REAL,
United States Attorney,
JOHN K. VAN DE KAMP,
Assistant U. S. Attorney,
Chief, Criminal Division,
ROBERT L. BROSIO,
Assistant U. S. Attorney,
Assistant Chief, Criminal Division,
PHILLIP W. JOHNSON,
Assistant U. S. Attorney,

600 U. S. Court House,
312 North Spring Street,
Los Angeles, California 90012,

Attorneys for Appellee,
United States of America.

NO. 19826

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOHN WILLIAM WHALEY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

PETITION FOR REHEARING

APPEAL FROM
THE UNITED STATES COURT OF APPEALS
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
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MANUEL L. REAL,
United States Attorney,
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Assistant U. S. Attorney,
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ROBERT L. BROSIO,
Assistant U. S. Attorney,
Assistant Chief, Criminal Division,
PHILLIP W. JOHNSON,
Assistant U. S. Attorney,

600 U. S. Court House,
312 North Spring Street,
Los Angeles, California 90012,

Attorneys for Appellee,
United States of America.

TOPICAL INDEX

TABLE OF AUTHORITIES

Cases

Statutes

Rules

NO. 19826

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOHN WILLIAM WHALEY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

PETITION FOR REHEARING

TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT AND THE HONORABLE CIRCUIT JUDGES BARNES AND ELY AND JUDGE MADDEN OF THE UNITED STATES COURT OF CLAIMS:

Comes now the UNITED STATES OF AMERICA, appellee in the above-entitled cause, and, pursuant to the provisions of Rule 23 of the Rules of the United States Court of Appeals for the Ninth Circuit, petitions the panel which rendered the decision in the above-entitled cause, which said opinion was filed June 28, 1966, for a rehearing on the following grounds:

Appellant having alleged that the evidence before the trial Court was insufficient, and having failed to include a proper record, sufficient to enable the appellate Court to determine the validity or invalidity of his position, he has waived his claim of insufficient evidence.

Springer v. Best, 264 F. 2d 24, 28 (9th Cir. 1959).

Speaking for the Court in Springer, supra, Judge Barnes stated:

"We conclude that there is no rule requiring the transcript, or even a part of it, to be part of the record on appeal, but it is clear that this Court can decide only questions which can be determined from what record there is before it. All others must be presumed waived."

Springer, supra, footnote 2 at pp. 27-28 (Emphasis added).

Speaking for the Court in Union Pacific Railroad Co. v. Bridal Veil Lumber Co., 219 F. 2d 825, 833 (9th Cir. 1955), cert. denied, 350 U. S. 981 (1956), Judge Chambers stated:

"In the absence of a record of the testimony, this court assumes that the evidence supports a complete verdict. Bernards v. Johnson, 9 Cir., 103 F. 2d 567; Rickard v. Thompson, 9 Cir., 72 F. 2d 807."

A similar view appears in Clark v. Milens, 32 F. 2d 1004 (9th Cir. 1929).

" 'All possible presumptions are indulged to sustain the action of the trial court. It is, therefore, elementary that an appellant seeking reversal of an order entered by the trial court must furnish to the appellate court a sufficient record to positively show the alleged error.'"

United States v. Vanegas, 216 F. 2d 657, 658 (9th Cir. 1954).

"It is the appellant's duty to bring up a record that discloses error. Every intendment should be in favor of the lower court's judgment."

Hardt v. Kirkpatrick, 91 F. 2d 875, 878 (9th Cir. 1937), cert. denied, 303 U. S. 626 (1938).

Where the appellant asserts insufficiency of the evidence to support the action of the trial court, he has the burden of bringing the

evidence to the appellate court in order to meet the burden of showing grounds for reversal.

Jernigan v. Southern Pacific Company, 222 F.2d 245, 248-49 (9th Cir. 1955); Springer v. Best, supra, 264 F.2d 24, 29; In re Chapman Coal Co., 196 F.2d 779, 785 (7th Cir. 1952).

"In the absence of the production of all the evidence, under well-known rules, we must presume that the unreported evidence was sufficient to sustain the judgment."

In re Ripp, 242 F.2d 849, 851 (7th Cir. 1957) (Emphasis added).

The presumption of regularity is applied to affirm judgments or orders attacked upon the ground of insufficient evidence, where the evidence is not brought to the attention of the appellate court.

Bakersfield Abstract Co. v. Buckley, 100 F.2d 530, 531-32 (9th Cir. 1938); Bank of Eureka v. Partington, 91 F.2d 587, 590 (9th Cir. 1937); Aetna Ins. Co. v. Rhodes, 170 F.2d 111, 115 (10th Cir. 1948).

Appellee did not move to dismiss the appeal. The decision not to do so was a proper one under the circumstances:

"A further ground of dismissal urged by appellee is that the assignments of error raise questions which could not be decided without examining the evidence, and that the evidence is not in the record. This, if true, would be a ground of affirmance, not of dismissal."

Bank of Eureka v. Partington, supra, 91 F.2d 587, 589 (9th Cir. 1937) (Emphasis added).

The records of this Court will show that on or about March 30, 1965, appellee moved for an Order to Supplement the Record Upon Appeal at the expense of appellant. Appellant did not appear in

opposition to this Motion. The Motion was granted, except for the question of expense.

Appellant had a legal duty to furnish the additional portion of the transcript:

"It is clear that it is incumbent upon the appellant to file the additional parts of the reporter's transcript and that there is no duty imposed upon the appellant to furnish the parts of the transcript which he desires to have added to the record. If the appellant fails to file the additional parts, the court, on motion of the appellee, may require the appellant to furnish them."

United States v. Brodbeck, 139 F. 2d 916, 917-18 (3rd Cir. 1944) (Emphasis added).

This quotation from Brodbeck, supra, is based upon the Federal Rules of Civil Procedure, Rule 75(b), requiring the appellant to file a copy of the entire transcript if the appellee so desires. The same rule would apply in criminal cases, under the provisions of Rule 39(b)(1) of the Federal Rules of Criminal Procedure.

Appellee's attempt to remedy appellant's default in regard to the record upon appeal herein is discussed in the affidavit accompanying appellee's Motion to Continue Hearing and For Extension of Time To File Brief, filed herein on or about June 2, 1966. This affidavit mentioned the fact that the Court Reporter had passed away and that efforts had been made to obtain a complete transcript.

Since appellant's counsel informed this Court during oral argument on June 6, 1966, that he had had contact with the Court Reporter (Mr. Vaughan) on certain dates, a certified copy of the Certificate of Death of Mr. Vaughan is attached to the original copy of the within

brief, showing that Mr. Vaughan's death occurred on February 28, 1965. Since appellant's brief herein was filed on March 10, 1965, it was already too late for appellee to remedy appellant's default in failing to order a transcript of all of the testimony (see appellant's affidavit of March 12, 1965)!

The only alternative to dismissal of the appeal would be additional proceedings in the trial court in an effort to provide an accurate record. Such a procedure is outlined in United States v. Jones Coal Company, 325 F. 2d 877 (6th Cir. 1963).

CONCLUSION

In conclusion, it is respectfully submitted that either the judgment of conviction herein should be affirmed or the within cause should be remanded to the trial court for further proceedings in accordance with the rule in Jones Coal Company, supra.

In the alternative, in view of the exceptional procedural circumstances of the instant case, it is respectfully submitted that a new trial should be ordered so that appellee may have a legal ruling upon all of the evidence rather than those portions hand-picked by the adversary. An appellate Court has wide discretion under 28 U. S. C. A. 2106 to order a new trial in the interests of justice. A new trial may be ordered in cases of insufficiency of the evidence.

Wright v. United States, 250 F. 2d 4, 10 (C. A. D. C. 1957).

Appellee also requests that the opinion herein be modified to omit the reference to the Government's failure to file a brief. The brief was not due, as the Clerk of the Court herein notified appellee that the brief was not due until after the completion of the transcript (see Appendix "A" to this brief).

For the foregoing reasons, appellee respectfully submits that a rehearing of this cause should be ordered.

Respectfully submitted,

MANUEL L. REAL,
United States Attorney,
JOHN K. VAN DE KAMP,
Assistant U. S. Attorney,
Chief, Criminal Division,
ROBERT L. BROSIO,
Assistant U. S. Attorney,
Assistant Chief, Criminal Division,
PHILLIP W. JOHNSON,
Assistant U. S. Attorney,

Attorneys for Appellee,
United States of America.

CERTIFICATE

Pursuant to the provisions of Rule 23 of the United States Court of Appeals for the Ninth Circuit, I, Ronald S. Morrow, Assistant United States Attorney, attorney for appellee, certify that in my judgment the foregoing Petition for Rehearing is well founded, and I further certify that the filing thereof is not interposed for the purpose of delay.

/s/ Ronald S. Morrow

RONALD S. MORROW
Assistant United States Attorney

"APPENDIX A"

Office of the Clerk
U. S. Court of Appeals
For the Ninth Circuit
San Francisco, California 94101

May 11, 1965

Phillip W. Johnson, Esquire
Assistant U. S. Attorney
U. S. Custom and Court House
San Diego, California 92101

John W. Whaley v. U.S.A.
No. 19826
D.C. 32377 SD

Dear Mr. Johnson:

In reply to your letter of May 7, undoubtedly you are correct in your statement that the time to file your brief will not commence to run until the transcript is completed.

I regret having bothered you about its filing.

Very truly yours,

Frank H. Schmid

Frank H. Schmid, Clerk

See also Vol. 334

In the

United States Court of Appeals

For the Ninth Circuit

No. 19,827

CATAPHOTE CORPORATION, A CORPORATION,
Plaintiff-Appellant,

vs.

DE SOTO CHEMICAL COATINGS, INC., A CORPORATION,
Defendant-Appellee,

PERMA-LINE MANUFACTURING CORPORATION OF AMERICA, A CORPORATION,
Additional Defendant on Counterclaim.

APPELLANT'S PETITION FOR REHEARING.

CHARLES J. MERRIAM,
WILLIAM A. MARSHALL,
ALVIN D. SHULMAN,
MERRIAM, MARSHALL SHAPIRO & KLOSE,
30 West Monroe St.,
Chicago, Illinois 60603.

ALLAN R. MOLTZEN,
LERER, MOLTZEN & MCATEER,
1405 Mills Tower,
220 Bush St.,
San Francisco, California 94104,
Attorneys for Plaintiff-Appellant.

THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

TABLE OF CONTENTS.

Table of Authorities.

Cases.

Statutes and Rules.

In the

United States Court of Appeals

For the Ninth Circuit

No. 19,827.

CATAPHOTE CORPORATION, A CORPORATION,
Plaintiff-Appellant,

vs.

DE SOTO CHEMICAL COATINGS, INC., A CORPORATION,
Defendant-Appellee,

PERMA-LINE MANUFACTURING CORPORATION OF AMERICA, A CORPORATION,
Additional Defendant on Counterclaim.

APPELLANT'S PETITION FOR REHEARING.

Now comes Cataphote Corporation, plaintiff-appellant, and respectfully petitions for a rehearing of this Court's decision of February 8, 1966 affirming the District Court's judgment that Claims 3-5 of United States Letters Patent 3,036,928 are invalid.

This Petition for Rehearing is based on the following points:

1. Claims 3-5 were held invalid as a result of considering issues, namely inventorship and patentability, on which plaintiff-appellant was not given a proper opportunity to present evidence;

2. Claims 3-5 are presumptively valid, and the burden of proving invalidity is on the defendant which offered no evidence of probative value on these issues.

ARGUMENT.

A. The Subject Matter of the Patent in Suit.

The patent in suit is directed to the use of a two-component binder in a thermoplastic highway marking composition. The binder is used as a vehicle for carrying glass beads which enhance the reflective characteristics of the composition. The composition also contains pigment for imparting color to the composition, filler which acts as a bulking agent, and other conventional constituents. After the composition is applied on a highway, the binder serves to hold the heterogeneous components in matrix, or like form, so that the respective functional properties of the components can be effective in use.

B. The Patent in Suit Contained Species Claims Directed to Mutually Exclusive Species, viz, Thermoplastic Highway Marking Compositions Containing Polystyrene Resin Binders (Claims 2 and 10) and Thermoplastic Highway Marking Compositions Containing Alkyd Resin Binders (Claims 3-5).

The patent issued from a continuation-in-part application based upon an earlier original application. A continuation-in-part (C-I-P) application:

> ". . . is an application filed during the lifetime of an earlier application by the same applicant, repeating some substantial portion or all of the earlier application *and adding matter not disclosed* in the said earlier case." *Manual of Patent Examining Procedure* § 201.08.

In this instance the purpose of filing the C-I-P application was to include claims and examples directed to com-

positions containing *alkyd resin* binders. These compositions were not included in the original application, the original application being directed to thermoplastic highway compositions containing polystyrene binder systems.

C. The Only Issue Which Was Supposed to Be Tried by the District Court Was Prior Public Use or Sale by Plaintiff of Its Thermoplastic Highway Marking Compositions.

This appeal came before this Court, not as the result of a full-blown trial of a patent case involving the several issues of validity and the issue of infringement, but as the result of the District Court granting defendant's motion for a separate trial, under Rule 42(a) FRCP, on the *single* issue of whether or not plaintiff's activities prior to the filing of the original patent application resulted in the patent being invalidated by reason of the patented invention being placed in prior public use or on sale contrary to the provisions of 35 U. S. C. § 102(b). The District Court in its Memorandum Decision (R. 6-7)* on this motion granted:

> "... defendant's motion for separate trial on the issue whether plaintiff's alleged invention is invalid because placed in public use or on sale in this country more than one year prior to the date of application for said patent within the meaning of 35 U. S. C. Section 102(b) ..."

This order clearly established the *single* issue which was to be tried at the separate trial.

---

* R. means Vol. 1 of Record.

D. Thermoplastic Highway Marking Compositions Including Alkyd Resin Binders Were Not Used in Plaintiff's Activities Which Were Held to Be a Prior Public Use or Sale.

There is no question that thermoplastic highway marking compositions containing *alkyd* resin binders, employed by plaintiff or anyone else, in any way, shape or form, were *not* involved in any prior public use or on sale more than one year prior to the filing of the C-I-P application. Plaintiff's activities which were reviewed in the trial of the prior public use and sale issue were limited solely to the use and/or sale of compositions containing *polystyrene* resin binders. No evidence of prior public use or sale of compositions containing alkyd resin binders was introduced; and, at no time, did defendant assert any such allegation in connection with compositions containing alkyd resin binders. Thus, Claims 3-5 could not be invalidated on this basis. *Blanchard* v. *Marzall,* 111 F. S. 125, 126 (D. C. 1952).

E. By Considering the Additional Issues of Inventorship and Patentability of Claims 3-5 Without Giving Plaintiff a Proper Opportunity to Present Evidence on These Issues, the Court Has Deprived Plaintiff of a Property Right Without Due Process of Law.

At the outset of the separate trial on the single issue of prior public use or sale, defendant raised the additional issues of inventorship and patentability of Claims 3-5 for the first time. Plaintiff's counsel objected to delving into these additional issues because plaintiff had only prepared for trial on the single issue of prior public use or sale. Plaintiff advised the District Court that consideration of these additional issues would require plaintiff to submit entirely different evidence than that applicable to the single issue and would require expert testimony

(T. 28-9)*. *Burroughs Wellcome & Co., Inc.* v. *Eli Lilly & Co.,* 150 F. 2d 946, 949 (C. A. 2 1945). In its motion for a separate trial on the single issue of prior public use or sale, defendant had represented that no expert was required (R. 6).

In spite of plaintiff's objections, the additional issues were considered by the trial court without giving plaintiff the opportunity to prepare evidence on these issues; and Claims 3-5 were held invalid by resolving these additional issues in favor of defendant.

It is grossly unfair, an abuse of discretion, and a lack of due process to order a trial on the single issue of prior public use or sale, and, at trial, over a party's objections, go into the additional issues of patentability and inventorship.

Just as in a pretrial order, the Court's Memorandum Decision on defendant's motion for a separate trial clearly limited the issue for trial to prior public use or sale. In *U. S.* v. *Ahtanum Irr. Dist.,* 124 F. S. 818, 827 (E. D. Wash. 1954), rev'd. on other grounds, the court stated:

> "An attempt to try issues which have not been outlined by either pleadings or pre-trial order is not only futile, but it is unjust. Any issue not so formulated cannot be tried because the parties do not know against what to defend. It is not in the case. * * * Unless the cause of action and defense be somewhere delineated before judgment, to the knowledge of the parties, due process of law has not been accorded and the trial is patently unfair."

This statement epitomizes plaintiff's position.

A situation similar to the one in this case was before this Court when it stated, in *Hargrave* v. *Wellman,* 276 F. 2d 948, 952 (C. A. 9 1960):

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* T. means Reporter's Transcript of Trial (Vols. 3-6 of Record).

"Moreover, the parties stipulated prior to trial that the appellant's case should proceed on the sole theory of negligence of the guide in putting his own mount into a sudden gallop without warning to Hargrave. In view of that stipulation appellant was not entitled to inject into the case a new theory of negligence unless, despite such stipulation, evidence tending to support such theory was received without objection."

A summary rejection of plaintiff's rights in the alkyd resin claims is unjust. Plaintiff should be given the opportunity to present evidence to the Court in support of the patentable distinction between these claims and the styrene resin claims, as well as on the issue of inventorship.

Accordingly, this case should be remanded to the District Court in order to permit plaintiff to present such evidence.

F. The Alkyd Resin Claims, 3-5, Were for a Separate Invention Than the Styrene Resin Claims.

In *Wire Tie Mach. Co.* v. *Pacific Box Corp.*, 102 F. 2d 543, 551 (C. A. 9 1939), this Court stated:

"Claims of a patent are independent inventions. One may be infringed and others not; one may be valid and the rest invalid. The patent does not stand or fall as a unity. (Citing cases.)"

G. Claims 3-5 Are Presumed Valid Until Defendant Proves Otherwise.

35 U. S. C. § 282 states:

"A patent shall be presumed valid. Each claim of a patent (whether in independent or dependent form) shall be presumed valid independently of the validity of other claims; dependent claims shall be presumed valid even though dependent upon an invalid claim. The burden of establishing invalidity of a patent

or any claim thereof shall rest on the party asserting it."

The reasons for this presumption are spelled out in *U. S. Pipe & Fdry. Co.* v. *James B. Clow & Sons, Inc.*, 205 F. S. 140, 152 (N. D. Ala. 1962), citing this Court:

> "The necessity for this presumption is made clear when it is borne in mind that judges, in most instances, are inexperienced in the complex technical aspects present in patent litigation. As stated in *Moon et al.* v. *Cabot Shops, Inc.*, 1959, 9 Cir., 270 F. 2d 539, 541:
>
> > 'A presumption of validity arises from the issuance of a patent. The presumption is predicated upon the expertness of the Patent Office acting within its specific field, and can be overcome only by clear and convincing proof. The burden of proof in such cases is upon the party attacking the patent, and reasonable doubts must be resolved in favor of validity. See *Patterson-Ballagh Corp.* v. *Moss*, 9 Cir., 201 F. 2d 403, 406.'
>
> "Anything short of this presumption would enable the courts to substitute their unfamiliarity for the expertness of those skilled and qualified to act within their specific field."

In light of the requirements of 35 U. S. C. § 282, this Court erred when it stated, in connection with Claims 3-5:

> "The alkyd resin patent claim is clearly barred by the same public use and sale which barred the styrene resin claim. The variation represented by the change in resin composition was not demonstrated to have entailed a patentable novelty."

Not only must the alkyd resin claims be considered independently of the styrene resin claims, but also, there was no burden on plaintiff to demonstrate patentable novelty of Claims 3-5 over the styrene resin claims. The Patent Office had already decided that plaintiff had done this. The

burden was on defendant to demonstrate *lack* of patentable novelty.

H. The District Court Referred to No Evidence In Support of Its Findings on the Additional Issues and Defendant Introduced None of Probative Value.

The District Court made many specific fact findings in connection with the issue of prior public use or sale. But, on the additional issues of inventorship and patentability of Claims 3-5, the District Court merely made general allusions to "evidence" without specifying what evidence it relied upon to support its conclusions (R. 26-27); and defendant has been of no help in this regard.

I. What Is the Evidence to Support the Court's Findings That Poole Was Not the Inventor of the Alkyd Resin Binder Concept?

Here the answer must be "none." The District Court referred to none. Plaintiff introduced no evidence on this issue; and defendant, over plaintiff's objection, argued that simply because Poole did not formulate the specific example used to illustrate the alkyd resin concept he was not the inventor.

Inclusion in patent applications of illustrative examples which have been formulated by others is common practice which has no illegal implications. As plaintiff pointed out, at page 42 in its main brief on appeal, the specification must include an example of the best mode known at the time for carrying out the invention. This mode can be formulated by one other than the inventor, and this is approved by the Courts. *Benger* v. *Laros,* 209 F. S. 639, 644 (E. D. Pa. 1962), aff'd. per curiam 317 F. 2d 455.

Poole never denied that he was the inventor. This question was never asked by defendant in spite of the fact that

it spent a considerable time taking Poole's deposition. Furthermore, Poole signed an oath that he was the inventor. The presumption raised by this action cannot be ignored. Defendant did not show that Poole was coerced or threatened into signing the oath. Poole did not testify that he was forced to sign the oath. It therefore must be irrefutably presumed that the act of signing the oath was done freely and without duress knowing full well the contents and significance of the oath.

The question with which the Court should be concerned was not who formulated the specific illustrative alkyd resin composition which was *described,* but who invented the alkyd resin composition which was *claimed.* Incidentally, this issue was not passed upon by this Court and clarification is requested.

J. What Is the Evidence to Support the Court's Findings That Alkyd Resin Binders for Thermoplastic Highway Marking Compositions Are Non-Substantial Variations of the Styrene Resin Binders?

The answer to this question is "there is *none.*" The District Court did not specifically refer to any, and the defendant, who had the burden of proving this issue with clear and convincing proof, did not introduce any. Pages 46-47 of defendant-appellee's brief on the appeal are directed to this issue but consist entirely of argument based on false premises unsupported by case law. No reference is made to evidence.

In commenting upon the statutory presumption of validity imposed by 35 U. S. C. § 282, the Fourth Circuit stated in *Power Curbers, Inc.* v. *E. D. Etnyre & Co.,* 298 F. 2d 484, 493 (C. A. 4 1962):

> "Mere argument will not suffice to overcome this statutory presumption and to sustain the burden imposed upon the defendants who assert invalidity."

Conclusion.

Claims 3-5 relating to thermoplastic highway marking compositions containing alkyd resin binders were granted to plaintiff by the United States Patent Office independently of those claims in the same patent directed to thermoplastic highway marking compositions containing styrene binders. The doctrine of severability of patent claims is well established; and the law should look to the preservation of residual rights. Like a divisible contract, a patent, because of its claim structure and contractual characteristics, is susceptible to division and apportionment and may contain rights each of which may be enforced independently of the other. In this instance, because of the mutual exclusivity of the styrene claims and the alkyd resin claims, the Court should not render the alkyd resin claims unenforceable without a complete and fair hearing on the issues of patentability and inventorship.

The decision of the District Court on Claims 3-5 should be reversed and remanded for a complete and fair hearing on the issues of patentability and inventorship.

Respectfully submitted,

Charles J. Merriam,
William A. Marshall,
Alvin D. Shulman,
Merriam, Marshall Shapiro & Klose,
30 West Monroe St.,
Chicago, Illinois 60603.

Allan R. Moltzen,
Lerer, Moltzen & McAteer,
1405 Mills Tower,
220 Bush St.,
San Francisco, California 94104,
Attorneys for Plaintiff-Appellant.

Certificate of Counsel.

I certify that in connection with the preparation of this petition, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing petition is in full compliance with those rules.

Alvin D. Shulman,
One of the Attorneys
for Appellant.

No. 19833

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

Recold Corporation,
a corporation, and
Lester K. Quick,

Appellants,

vs.

David A. Nurse, dba
David A. Nurse Company, and
Hugh Robinson & Sons, a
corporation,

Appellees.

APPELLANTS' OPENING BRIEF

Lyon & Lyon
Lewis E. Lyon
811 West Seventh Street
Los Angeles, California 90017

*Attorneys for Appellants
Recold Corporation and
Lester K. Quick*

Jeffries Banknote Company, Los Angeles — MA 7-9514

SUBJECT INDEX

TABLE OF AUTHORITIES CITED

Statutes

Dictionaries

Other References

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APPELLANTS' OPENING BRIEF

This appeal is from a judgment of the United States District Court for the Southern District of California holding invalid the Lester K. Quick Patent No. 2,953,906, granted September 27, 1960, for Refrigerant Flow Control Apparatus.

STATEMENT OF JURISDICTION

The jurisdiction of this Court and of the District Court is within the provisions of 28 U.S.C. § 1338(a) and the jurisdiction of this Court to review the judgment of the District Court is within the provisions of 28 U.S.C. § 1291. The Kramer-Trenton Company, manufacturer of the Thaw Systems, is defending, paying all costs, directing and controlling the defense.

STATEMENT OF THE CASE

Subject Matter

In refrigeration, particularly as employed commercially and operated at below freezing temperatures, a problem has long existed in the elimination of the frost which accumulates on the evaporator surface. This frost must be eliminated or its formation controlled because it would otherwise effectively reduce the efficiency of the heat transfer so that refrigeration would stop and the temperature within the refrigerated space rise to unwanted heights. Many systems have been developed for the removal of the frost in commercial refrigeration which in this respect differs quite radically from home-type refrigeration units which are normally operated at or above freezing. The refrigeration system most universally employed is the closed cycle type and includes a compressor and piping leading from the compressor to the condenser in which refrigerant compressed in the compressor is cooled so that it liquefies, then passes to a receiver and from the receiver passes to an expansion valve which controls the rate of flow and pressure conditions of the refrigerant passing into the evaporator. This side of the closed refrigeration cycle is known as the high pressure side.

In the evaporator the liquid refrigerant takes on heat from the surroundings with the result that the refrigerant is evaporated. The evaporation of the liquid refrigerant in the evaporator is at a relatively low temperature, very materially below freezing and the evaporation is caused to take place within refrigeration tubes normally having finned surfaces to give a relatively large area for contact with the air in the refrigerated space. The air is circulated over the finned tubes by a fan cooling the air and reducing the temperature within the refrigerated

space. Water in the air deposits upon the tubes and fins in a form of "frost" which, if allowed to build up, would inhibit the flow of air over the surfaces and act as an effective insulator to prevent the transfer of heat from the air to the refrigerant within the evaporator. Thus, periodic defrosting is required in commercial refrigeration units.

Many systems were developed for defrosting, the most commonly employed at the time of the invention of the system disclosed in the Quick patent in suit being "water defrost". Water defrost was developed by appellants and was licensed throughout the country. The water defrost patent was sustained by this Court in *York v. Refrigeration Engineering,* 168 F.2d 896. However, water defrost presented many problems, and even though it was the best then in existence, it left many things to be desired. This system is reviewed in the article "Automatic Defrost" written by Otto J. Nussbaum, Chief Engineer of Kramer-Trenton Company, in the paper, Exhibit 6B, given at the Annual Meeting of the American Society of Refrigeration Engineers in Miami Beach, Florida, June 3-5, 1957. Kramer-Trenton Company was one of the licensees of the McAdam water defrost patent. It has long been known that the most economical method of defrosting was the "hot gas" system of defrosting which was developed as early as 1888 and its basic fundamentals are described in a German patent issued in 1888, Exhibit 6B, page 1.

The system of hot gas defrost could not be and was not widely used for reasons which are fully explained in the publications which are exhibits in this cause and because of the difficulty of "slugging" the compressor with the ultimate destruction of the compressor and danger to the operator as explained in the article which appeared in Industrial Refrigeration, December 1955 issue, Exhibit

32 herein. This article describes the problems encountered with respect to hot gas defrosting and pictorially illustrates the damaged compressor caused by slugging of the compressor. It was at this stage of this art that Lester K. Quick, a refrigeration serviceman, operating in Eugene, Oregon, was called upon to make an installation of refrigeration in a supermarket in Eugene, Oregon. Lester K. Quick was thoroughly acquainted with all refrigeration systems then in existence. Quick bought a Larkin system which was a modified hot gas defrost system and installed the same in the market and the system failed in use. He was required to make the system work and it was under this necessity that the invention of the patent in suit was born. Quick installed the system of his invention in this market on an experimental basis, and as subsequently modified it became the subject matter of the successive applications for patent filed by Lester K. Quick, the first of which was filed December 4, 1953, assigned Serial No. 396,115, and was entitled "Accumulator Trap for Refrigerating Systems", and is Exhibit 2 included in Volume 3 of the transcript here on appeal. This application was subsequently revised and a second application was filed by Lester K. Quick, Serial No. 436,784 on June 15, 1954, entitled "Refrigerating Apparatus". A substitute for this application was filed, being application Serial No. 506,784, filed in the Patent Office on May 9, 1955, as a continuation-in-part of the prior filed application, and it is upon this application that the patent No. 2,953,906 was granted and issued.

Throughout this period of time experimentation and testing of the Quick system of defrosting continued even after the invention was licensed to appellant Recold Corporation.

Recold Corporation learned of the possible Quick solution to the problem of hot gas defrosting and its Presi-

dent and Chief Engineer contacted Quick in Eugene, Oregon, and entered into an option agreement with Quick, dependent upon two factors: (1) the development of the question of novelty of the invention; (2) the further experimentation to determine whether or not Quick's solution to the problem was adequate to meet all problems of the refrigeration industry as those existed in the commercial fields under all varying conditions of operation. Recold Corporation investigated both factors and proved to its satisfaction that Quick had indeed solved the problem in a patentable manner.

Refrigeration systems, as is well known to this Court and to all, are systems that must operate continuously without breakdown or shutdown, particularly where the operations are carried on to freeze food. A breakdown in the refrigeration system such as occasioned by slugging of the compressor could result in the loss of the entire product or products under refrigeration before adequate repairs could be made.

After being satisfied with its proofs that the Quick discovery did amount to a solution to the problem under all conditions of operation, the plaintiff appellant Recold Corporation exercised its option. The system of refrigeration and defrosting Recold Corporation was then offering to the trade was the water defrost system. Within a short period of time after Recold exercised its option and began the commercial exploitation of the Quick hot gas defrost system, it substantially replaced the water defrost system. Its great commercial success is shown by the rapidity with which it overtook the then universally licensed water defrost system. This is shown, as it was to the Patent Office (Exhibit C, page 60 thereof, Defendants' Book of Exhibits, Volume 4). Recold Corporation began its sale of the elements of the Quick invention in 1955, selling in the first year 49 such units. In four

years, namely, in the year 1959 the volume of business rose from approximately $14,000 in 1955 to $648,000 in 1959. As shown by the record the equipment sold by Recold Corporation is not the entire equipment as illustrated in the Quick patent in suit but includes the evaporator, the metering trap 60 and in some cases the condenser 14 with the necessary valving which in this case is of a limited character. It does not include the sale of the compressors.

It thus appears that for the first time the problem which prevented the widespread use of the hot gas defrost system since 1888 had been solved. Quick was the first to devise a method *which did not require complete re-evaporation of the liquid refrigerant* resulting from defrosting in the low pressure side of the closed system of refrigeration before that refrigerant could be returned to the compressor.

It is fundamental in the consideration of this case to consider the representation made to the Court by the defendants and on behalf of Kramer-Trenton Company as to the defendant appellees' theory of defense of this case. This theory is based upon the belief even in appellees' presentation of its case to the District Court that the Thaw system charged to infringe the Quick patent in suit operated to completely re-evaporate the liquid refrigerant before it could reach the compressor. It was shown to the Court that as a matter of fact through the very simple arithmetic of the system large quantities of liquid refrigerant would be returned to the compressor if it were not for the Thaw system use of the metering accumulator invented by Quick and borrowed in toto from the Recold system.

Kramer-Trenton had, since 1945, sold its Thermobank system before copying the Quick invention in about 1960.

Thus, imitation alone has been held to establish invention. *Florence-Mayo Nuway Co. v. Hardy et al.,* 168 F.2d 778, 782 (C.A. 4, 1948), and *Neff v. Cohu,* 298 F.2d 82, 87 (C.A. 9, 1961).

The entire thesis of the Kramer-Trenton Company Thermobank system is predicated upon the necessity of having a sufficient "heat bank" to which the liquid refrigerant flows after leaving the evaporator to completely re-evaporate the liquid refrigerant. With this belief, as expressed through the teaching of Kramer-Trenton in its Thermobank system and in its review of the existing systems of defrosting as shown by Exhibits 6A, 6B, 6C, and 6D, Kramer-Trenton Company inspected a Recold Vapomatic (Quick) system at a 1955 exhibit at an industry meeting. After this inspection, and after Recold's phenomenal success with the system of Quick's invention, Kramer-Trenton Company brought out its Thaw system, copying in its entirety the Quick invention and the metering accumulator as a means of avoiding the great expense incident to such installations as the Thermobank system.

In this case, therefore, we have (1) a long existing problem; (2) a solution to that problem brought about by necessity; and (3) opportunity, after inspection and examination of the literature with respect to the patented system, to copy the invention and subsequent copying thereof, including that most essential element thereof, the metering accumulator as used in the suction line and which metering accumulator includes a calibrated metering tube which it is stated in the Thaw Bulletin Exhibit 9 provides a positive control of the liquid refrigerant:

> "Control of the Liquid is positive by the use of a calibrated metering tube during defrost."

SPECIFICATION OF ERRORS

Appellants herein will rely upon the following as specification of errors of the District Court.

1. The District Court erred in holding Letters Patent No. 2,953,906 and each of the claims thereof invalid as anticipated by or as failing to disclose invention over the prior art patents and publications of the art, including the patents to:

(a) Charles F. Kettering No. 1,978,463 of October 30, 1934 (Findings 10, 11, 12, and 23);

(b) Otto J. Nussbaum et al. No. 2,564,310 of August 14, 1951 (Findings 20, 21, 23 and 24);

(c) Albert T. Marshall No. 1,594,422 of August 3, 1926 (Findings 23, and 26);

(d) Richard E. Pabst No. 2,589,855 of March 18, 1952 (Findings 22, 23, and 26);

(e) Thomas-Houston Company (British Patent) No. 554,807 of July 20, 1943 (Findings 13 and 23);

and/or

(f) the printed publication of the article or articles by Thomas H. Hart of February 1951, Exhibit P herein, or the article by Thomas H. Hart of March, 1951, Exhibit Q herein (Findings 14, and 15).

2. The District Court erred in holding with respect to the prosecution of the application for the Quick patent in suit before the United States Patent Office that:

(a) the Examiner of the Patent Office had not considered the Kettering Patent No. 1,978,463 (Finding 12);

(b) the Patent Office had not considered the Nussbaum Patent No. 2,564,310 (Finding 20);

(e) there was in the prosecution of the application before the Patent Office any departure from, or any direct contradiction to, the specification of the patent in suit in the presentation of the matter to the Examiner at the oral interview had with the Patent Office Examiner (Findings 25, and 27);

(d) there was any misrepresentation made to the Patent Office which materially or in any way affected the presentation of this matter to the Examiner or resulted in any action taken by the Examiner (Finding 27).

3. The District Court erred as a matter of fact and law that the elements of the Quick invention were old in the art and in concluding as a matter of law therefrom that the Quick patent was invalid (Conclusions of Law 3, 4, and 5).

ARGUMENT AND LAW APPLICABLE

The Quick Patent No. 2,953,906

The invention made by Quick as defined in the claims of the patent in suit as it was presented to the Patent Office and as differentiated from the prior concept in this art is, when understood, of the utmost simplicity. It proceeds upon the concept which is a direct antithesis of the concept of the prior art and is indeed the direct antithesis of the defendant-appellees' position before the District Court.

The Quick Concept

The Quick concept is that by collecting the large volume of liquid refrigerant condensed during the defrosting, holding that large volume of liquid, and metering it back at a controlled rate into the gaseous refrigerant also bypassing through the suction line, that large volume of

liquid refrigerant could be so dispersed in the gaseous refrigerant as to permit the same to pass through the compressor without liability of damage to the compressor and that this operation could be performed under all conditions met by commercial refrigeration in the field which are very highly variable. The concept of the art prior to the Quick invention is, as will be pointed out, that in order to operate the hot gas defrosting system there had to be complete re-evaporation of the liquid refrigerant produced during the defrosting before the intake of the compressor or, as taught by the art, conditions could be encountered in which there would be compressor destruction.

The Quick conception on the one hand is a slow metering of liquid refrigerant into gaseous refrigerant so that the gaseous refrigerant can carry the liquid refrigerant as it is dispersed in small quantities therein through the head of the compressor without damage. The concept of the prior art was that there must be total re-evaporation of the liquid refrigerant in the suction line. The large quantity of refrigerant referred to is that quantity of liquid refrigerant which is resultant of a defrosting operation where the hot gaseous refrigerant is condensed to a liquid in the evaporator as a result of that hot gaseous refrigerant giving up its heat to melt the frost from the refrigerating surfaces of the evaporator. That this is a large volume of refrigerant is evident from the calculations of the quantity of refrigerant condensed during refrigeration and a specific example calculated being in the order of in excess of fifty pounds during a single defrosting operation even in the accused Thaw apparatus (Tr. Vol. 13, page 1562).

The Prior Art Concept

The prior art concept of the requirement of total re-evaporation of a liquid refrigerant before it could be

returned to the compressor is fully documented through the writings of the personnel of Kramer-Trenton Company and others. Recalling that the hot gas defrost system was first patented in Germany in the 1880's, it remained until Quick of necessity solved the problem of avoiding total re-evaporation in 1953, and actual demonstration to the art that such a system could be commercially used before any widespread attempt was made to use a hot gas defrost system without relying upon such total re-evaporation.

As disclosed in the Quick patent the refrigerant gas is compressed in a compressor 11 and due to the work of compression leaves the compressor at high pressure through line 12 to the condenser 14. The condenser 14 is a heat exchanger and the hot high temperature refrigerant's heat is given up to the surrounding air with the result that refrigerant at the high pressure condenses to a liquid and passes into a receiver from which it passes through the expansion valve 15 to an evaporator 10, which may be of any desired form but which usually in this art consists of a coil of pipes having fins on its exterior to increase its refrigeration surface and through which pipes and over which fins the air is caused to travel by a simple fan. The evaporator is located in the space desired to be refrigerated. The liquid refrigerant after passing into the evaporator takes heat from the surrounding air as it is blown over the refrigerated surface and is evaporated into a gas and then returns through the low pressure line 13 back to the compressor 11 where it is recompressed.

Thus, the closed cycle of refrigeration is completed, and it will be obvious that it is dependent upon two operations, the taking of heat from the gaseous refrigerant by the condenser at high pressure to produce a liquid refrigerant which then again takes on heat of the

refrigerant space and at the low pressure becomes again a gas, and that the work put into this system is primarily that of the compressor plus the cooling and heating effect of the air operating in conjunction with the condenser 14 and the evaporator 10.

The hot gas method of defrosting as it was disclosed in the 1888 patent issued in Germany and as it was known throughout this art from the period of 1888 until Mr. Quick's invention, consisted in taking the hot gas from the compressor through a bypass line 60 which bypasses the condenser and the expansion valve directly through the line 16 to the evaporator 10. Under this condition the evaporator becomes a condenser and the hot gas gives up its heat to the refrigerating surface of the condenser, resulting in melting of the frost from the evaporator surfaces. The refrigerant gas is thus cooled to a point where it is condensed to a liquid. Unless inhibited this liquid will flow directly through the low pressure line back to the compressor in what is known in the art as slugs of liquid refrigerant which, on arriving at the compressor would, unless controlled, completely disrupt the operation of the compressor.

That the art had proceeded from 1888 to the time of the Quick invention upon the concept that to use the hot gas defrost system one must provide means for total re-evaporation of the liquid refrigerant cannot be doubted in view of the extensive writings upon this subject, some of which are those of Kramer-Trenton Company, its President, Israel Kramer, and its Chief Engineer, Mr. Otto Nussbaum. It was the presentation of these facts to the Patent Office that resulted in the allowance of the Quick patent.

The published art introduced during this trial includes many articles written in the nature of reviews of the

available means for effecting a defrosting operation which is in itself significant as showing the extent to which the problem was recognized by the art. In *York v. Refrigeration Engineering,* 168 F.2d 896, where the Court sustained validity of the water defrost patent, the comparison is there made, throughout the transcript of that evidence, between water defrosting and hot gas refrigeration, showing that the water defrost enabled effective defrosting to be accomplished without danger to the equipment while hot gas defrosting, although resorted to on occasion in desperation, was recognized by the art as a system which was too dangerous for general application, although it was recognized that if it could be made dependable it had the advantage of introducing no new or secondary element into the closed system of defrosting, introduce no extraneous heat and did not introduce elements into the system which were expensive or which complicated the operation of the simple closed cycle system of refrigeration.

Refrigeration equipment to be commercially operative must be a system which will operate 24 hours a day, 365 days a year, year in and year out, without failure. Such a requirement for the refrigeration system was obviously not possible to obtain through the known system of hot gas defrosting as will be evident from reading this mass of literature produced by both plaintiffs and defendants below. The real test of the invention in this case is what was the knowledge and belief of the art at the time that Quick entered the field in 1953 and as compared with what Quick demonstrated to the art.

Considering the publications of the art on this basis, we first consider the article written by Israel Kramer, President of the Kramer-Trenton Company, entitled "The 'Thermobank' System" as it was presented to the

American Society of Refrigeration Engineers (A.S.R.E.) at the 32nd Spring Meeting held in June 1945 (Exhibit 6A). This paper thus presented is in the nature of a review of the knowledge of the art at that time of the means available for effecting the defrosting of a refrigeration system of the closed cycle character. Kramer carefully reviews the then well known existing systems. He first delineates the efforts which were made to put into the system electric heaters for effecting melting of the frost by the use of electrical heaters. He reviews these attempts on the second and third pages of his article and succinctly sets forth the advantages and disadvantages of such a system and their shortcomings, and thus in enumerating the disadvantages set forth shows clearly why the attempts to use electric defrosting failed. He then considers the water defrost system which at that time was licensed to the Kramer-Trenton Company and which they used for some period of time under license and under the patent sustained by this Court. The water defrost system as thus delineated by Mr. Kramer was, until the introduction of the Quick system in 1953, by far the most popular system in use and was universally licensed to substantially all manufacturers of refrigeration equipment and was in effect the best solution to the defrost problem then in existence. Its disadvantages are fairly enumerated by Mr. Kramer in the article, Exhibit 6A, on page 4 thereof. A further disadvantage may be expressed and that is the danger of the water drain system to become flooded with the result that upon reactivation of the refrigeration cycle the entire system could be made a frozen mass of ice so that it was impossible under such conditions to maintain the low degree of temperatures required. In other words, a leak in the water defrost system within the refrigerated base was fatal and did occur.

Kramer then reviews the then existing hot gas defrosting system and does in Figure 8 of his article set forth the hot gas system without benefit of any means inhibiting direct flow of condensed liquid refrigerant to the compressor. In discussing this system of hot gas defrost as well as the so-called regenerative hot gas system Mr. Kramer concludes with the statement which summarizes the then knowledge of the art:

> " . . . In order to achieve a completely automatic defrosting system with hot gas, a supply of heat must be instantly available for defrosting under all conditions of operation in order to re-evaporate the condensed refrigerant before it enters the suction valve of the compressor." (Exhibit 6A, page 5, 3rd paragraph).

In order to effect this complete re-evaporation of the liquid refrigerant the Kramer-Trenton Company developed the "Thermobank" System, which system is in effect the establishment of a heat bank of sufficient capacity into which all liquid refrigerant is delivered in the suction line and the capacity of the heat bank is sufficient to effect complete re-evaporation of the liquid refrigerant before it can return to the compressor. The particular precaution is pointed out by Mr. Kramer in this respect on page 7, first column, wherein comparing the heat bank capacity with the requirement of heat, Mr. Kramer states:

> "In some cases it may happen that the ice load accumulated is greater than the amount of heat which the particular 'bank' can supply. When this occurs the liquid will slug back into the compressor intake for a very brief period. Although the compressor can handle some liquid slugging, it is not recommended practice. . . ."

In order to avoid this possibility of slugging the compressor because of insufficient capacity of the "Thermobank" system, this article teaches the introduction into the suction line of a hot gas throttling valve which is throttled down to prevent the flow of refrigerant to the compressor or to control that flow, as Mr. Kramer states, until the first evidence of liquid refrigerant at the compressor disappears, that is, the appearance of frosting of the compressor intake valve. Thus, Mr. Kramer teaches:

> ". . . Normally, this valve remains open, but in the event that liquid is slugging back, it is throttled until frosting at the intake valve at the compressor disappears. . . ." (Exhibit 6A, page 7).

In this "Thermobank" System and because there is a holding therein of the liquid refrigerant until it can be completely "re-evaporated", the hold tank is supplied with an oil return line, the function of which is to return to the crankcase of the compressor any oil which may separate from the liquid refrigerant in the Thermobank and return that oil to the crankcase of the compressor when it is required for lubrication. Of this return line the specific teaching of the Thermobank System is as found in this article:

> ". . . This line is small in diameter, just sufficient to permit the return of oil without allowing liquid refrigerant to drain into the compressor suction." (Exhibit 6A, page 6, third column).

The recognition of this art of the danger of slugging back a compressor is particularly shown in this article, in the comments given at the meeting upon its presentation. Thus, we find on page 9 of this article, the comment given with respect to the possibility of a slug returning

to the compressor and which is clearly pointed out by Mr. C. N. Deverall, a member of the Society:

> "In evaluating the advantages and disadvantages of the system I would list as a decided disadvantage the author's suggestion that the system might 'slug back to the compressor,' a condition that should not be permitted at any time. . . ." (Exhibit 6B, page 9, middle column).

Also the comments of Mr. A. G. Loeffel also contained on page 9, who stated his views with respect to this matter as follows:

> "Hot gas defrosting systems have too often wrecked compressors with liquid slugs due either to incompetent operation or faulty system design. . . ."

It is interesting to note that Mr. Israel Kramer, the author of the article, agreed completely with the observations made by Mr. Deverall and Mr. Loeffel and specifically pointed out the steps in each case taken to avoid all possibility of liquid slugging the compressor when using the Thermobank system. These remarks are found upon the 11th and last page of this presentation.

After the Israel Kramer article (Exhibit 6A) there appeared in this art the article written by Otto J. Nussbaum, then Chief Engineer of the Kramer-Trenton Company (Exhibit 6C) which appeared in the March 1946 issue of Refrigeration Industry and entitled "The Thermobank Simplified". This article is also included as defendants' Exhibit E. This article again seeks to review the then known existing methods of effecting defrosting as compared with the "Thermobank". In this article Mr. Nussbaum demonstrates the complete impracticability of the hot gas defrosting system and after reviewing its operation states:

"The system shown in Figure 1 is therefore impractical for two reasons:

(a) it does not always provide enough heat for complete defrost, and

(b) it would soon cause compressor trouble.

(Exhibit 6C, page 3, first column).

The writer then again reviews the attempts to use an electric defrosting system and comes to substantially the same conclusion with respect to the attempts to use an electric defrosting system as does Israel Kramer in Exhibit 6A, and makes the clear observation that by the time an electric heater could supply sufficient heat to evaporate the liquid refrigerant it is too late as the liquid refrigerant has already reached the compressor, stating:

". . . By the time the electric heater is warm, a large quantity of liquid has already reached the compressor. . . ."

While it was recognized in all of these systems that some re-evaporation of the liquid refrigerant always takes place between the evaporator and the compressor, such exposure of the suction line and other equipment to the atmosphere can not be relied upon to effect evaporation. Thus, Mr. Nussbaum states in this article:

". . . Some of this liquid is evaporated in the suction line and the remainder in the compressor. Unfortunately, the heat supplied to the refrigerant in the suction line and in the compressor is not sufficient to replace the heat given up in the evaporator. This is especially true when the temperature surrounding the compressor is low and the ice accumulation on the evaporator is considerable. Also, the admission of considerable quantities of refrigerant liquid into

the intake of the compressor frequently proves to be injurious to the machine, especially at high rotative speeds." (Exhibit 6C, pages 2-3).

Thus, Mr. Nussbaum establishes that the knowledge of the art in March 1946 was that one could not rely upon exposure of the suction line or other elements of the closed cycle refrigeration system to the heat of the surroundings to effect re-evaporation of the liquid refrigerant and that to do so would probably result in injury to the compressor.

Significantly, Mr. Nussbaum in his article points out what is in use at the time of his article and lists these on page 2 thereof and then proceeds to make a careful analysis of each system, its shortcomings and its failure to meet the problems and any fair reading of this article will show that at any time hot gas defrosting is attempted to be used it could only be used by introducing into the system a second means which acts as a re-evaporator to re-evaporate all liquid refrigerant before it can reach the compressor. Thus, in speaking of the system shown and other forms illustrated, he points out that hot brine has been used in the system as shown in Figure 3 of his article and that hot brine is flame heated in order to provide the necessary heat to "re-evaporate the refrigerant liquid as soon as defrost starts." (Page 3, center column, second paragraph).

In this article Mr. Nussbaum then discusses the Thermobank System and elaborately sets forth the structure and the particular pains taken to be sure that the Thermobank actually has a sufficient heat hold capacity to re-evaporate all liquid refrigerant before it can be returned to the compressor. Thus, Mr. Nussbaum states:

". . . The refrigerant, with a much lower heat content, is now in a liquid state and proceeds through

the suction line to the inner tank, where it is re-evaporated. In re-evaporating, a new quantity of heat is gained by the refrigerant which is used for further defrosting. The evaporated refrigerant proceeds through the top of the unit into the suction intake of the compressor. This cycle continues until defrost is complete." (Exhibit 6C, page 4, columns 1-2).

The entire thesis of this article is to elaborate upon the knowledge then prevalent in this art that when a hot gas system of defrost is utilized care must be taken to insure under all conditions complete re-evaporation of the liquid refrigerant produced.

In 1951, a further article appeared likewise reviewing the methods of defrosting then available and entitled "Methods of Defrosting Commercial Refrigerating Equipment", Plaintiffs' Exhibit 12, written by R. H. Luscombe, General Sales Manager, Penn Electric Switch Co., and presented at an educational conference held January 26-27-28, 1951. This article again reviews the available methods of defrosting, both above freezing and below freezing refrigeration systems and the evaporators thereof and lists the shortcomings of each and all of these systems, including water defrost, both manual and automatic, electric defrost, and hot gas method, and in speaking of the hot gas method again admonishes the art that if the evaporator becomes heavily iced some difficulties and faulty operation may result because of these frozen evaporators, and when speaking of the hot gas defrost and its method of use on page 5 thereof, states the common conception of the art at that time, i.e., the use of re-evaporator coils on the return line, stating:

". . . We might mention some variations employed by fixture manufacturers. They include the use of

> re-evaporator coils on the return line. These coils are equipped with fans which are operated only during the defrost cycle so that heat from the surrounding air is collected into the system to speed up the defrosting function. . . ."

The article then concludes with a review of the hot gas Thermobank system and discusses the use of the heat bank as a means of storage of heat during the operating cycle in an anti-freeze solution as a means of re-evaporating the liquid refrigerant before it is returned to the compressor. The knowledge of the art as it thus existed at this time is summarized in these articles and further in the articles written by Mr. Thomas H. Hart and which were presented at the American Society of Refrigeration Engineers in 1951 and which are here in evidence as Defendants' Exhibits P and Q. Any fair reading of these articles will, without taking isolated sections or sentences therefrom, convince any fair minded reader that the hot gas system of defrosting was unreliable, would result in danger to compressors, and the solution to the problem there presented lay in the re-evaporation of the liquid refrigerant before it could be returned to the compressor. The two articles, Exhibits P and Q, are successive and it is stated that they were to be considered together, and in Exhibit Q the teachings of the two articles are summarized in the following statement with respect to the reverse thermal method (hot gas) of operation:

> ". . . In actual operation there will be no question whether or not liquid is reaching the compressor for if it does the compressor will rattle and thump and dance with awe inspiring convulsions."

And with respect to the use of auxiliaries in the line to avoid slugging of the compressor and by the insertion into the line of a trap to hold the liquid refrigerant, Mr. Hart teaches:

> ". . . the suction line within the refrigerated space should not be trapped for a trap in the suction line would quite likely produce a slug which would have to be evaporated before it reached the suction inlet of the compressor." (Exhibit Q, page 1, last paragraph).

and teaches the necessity of re-evaporation under any conditions of operation wherein he states with respect to the slugging of a compressor:

> ". . . The remedy in this case is an accumulator in the suction line arranged to stop the slugs of liquid, allow them to re-evaporate, and at the same time provide for the return of oil to the compressor." (Page 247)

This was the then well known Thermobank System as it was previously described by Mr. Kramer and Mr. Nussbaum in Exhibits 6A and 6C. Mr. Hart was not talking to people who did not know the then existing systems of the art when he presented this paper, and it is quite obvious if we read this entire article, that the teaching of Mr. Hart in both Exhibits P and Q is that liquid refrigerant must be re-evaporated before it is allowed to enter the compressor, no matter whether you use the hot gas defrost system, reverse cycle, or any other system of defrosting. And again Mr. Hart points out the danger of slugging the compressor and that the defrosting system must be designed to eliminate this hazard, stating:

> ". . . Since no compressor is designed to take slugs of liquid refrigerant or oil, every installation should be designed to eliminate this hazard from other causes. . . ." (Exhibit Q, page 246).

Consistent with the knowledge of this art as it is shown to have existed at that time, the patentee Quick in the

Fall of 1953 installed at Emery's I.G.A. Store in South Salem, Oregon, a Larkin system (Finding of Fact 7), which system was a simple hot gas defrost system with the result:

> "The coil defrosted but the compressor jumped up and down and made all kinds of noises indicating that it was digesting liquid, which it should not.
>
> Q Was it necessary for you to make a change?
>
> A It was positively necessary."
> (Tr. Vol. 3, page 200, line 23 to page 201, line 2)

Quick then sought to add an accumulator to the suction line. Gathering from his experience with the use of the Thermobank system Quick, not being able to purchase an accumulator on the market (Tr. 201), sought how to make such an accumulator and to provide means for evaporating the liquid defrost which might be trapped in the accumulator. The accumulator which Mr. Quick built (Tr. 202) was substantially like that shown in the Quick patent in suit except that as originally constructed the accumulator was wrapped with a pipe containing hot water for the purpose of evaporating the liquid frost trapped therein substantially like the Thermobank concept.

It was at this time that Quick conceived his invention:

> "I began to realize that maybe my preconceived ideas that heat was absolutely necessary to effect hot-gas defrosting were not so. I therefore went back to my shop and started experimenting. Since I had another installation going in my home town only a few blocks from our office, in which we were to install two frozen-food cases, I proceeded to construct a more properly engineered accumulator to

install on this job as an experiment to see if what I had observed was really true." (Tr. 203)

It is interesting to note that Mr. Quick testified that he purchased a Thermobank system from Kramer-Trenton as a standby unit in case his experiment would not work (Tr. 203). On these jobs Mr. Quick carried on his experimentation and determined that by the use of an accumulator with a metering tube he was able to handle the liquid refrigerant produced during defrost and return it to the suction line, and that it was not necessary in such an operation to effect complete re-evaporation. Quick carried forward his experiments in additional stores (Tr. 206-207) and even in the second of these installations took the precaution to heat jacket with a copper coil his accumulator because, as stated by Quick, Tr. 209, line 17):

"Because I still could not believe that you could defrost without heat. I thought we had to have heat to be able to re-evaporate the liquid and to keep from damaging the compressor."

Quick then filed in the Patent Office his first application, Exhibit 2 herein, which was filed December 4, 1953, Serial No. 396,115. Quick sent copies of this application to manufacturing concerns engaged in this type of business, including both appellant Recold Corporation herein and the Kramer-Trenton Company, Tr. 213. The President, H. T. Jarvis, and Daniel D. Wile, the Chief Engineer of Appellant Recold Corporation visited Mr. Quick in Eugene, Oregon, with the result that Mr. Quick took these individuals to the installations which he had made (Tr. 216). Shortly thereafter an option was signed, dated October 18, 1954, which contemplated Recold Corporation carrying on further experimentation to determine whether the Quick solution could be commercialized (Tr.

218), at which time it was determined that it was advisable to file the third continuation-in-part application Serial No. 506,784, filed May 9, 1955 (Tr. 220).

Operating under this option Recold Corporation, appellant herein, placed in the field certain installations on an experimental basis to determine whether or not the Quick solution to the problem of hot gas defrosting had such reliability of operation as to make it commercially practicable under varying conditions of operation and after assuring itself through such experimentation that the Quick solution and invention was practical under varying conditions of operation Recold Corporation exercised its option. Mr. H. T. Jarvis, President of appellant, testified as to the reason for Recold's experimentation with the Quick invention as to the necessity thereof because of the many variable conditions under which such systems were required to operate and because Recold was skeptical that the Quick system could operate under all conditions. Even after acquiring the rights to the Quick invention Mr. Jarvis testified:

> "Q Now, when was it that you actually placed the system on sale or released it, as you say, to the public?
>
> A I can't give you the exact dates, Mr. Lyon, but I would estimate that it was perhaps six months to a year after we started research in our own lab before any system was allowed to be installed even close to the factories where they could be controlled.
>
> Q Yes.
>
> A And those controlled installations went on for a period of — as I stated before, 12 to 18 months." (Tr. Vol. 2, page 53, lines 15 to 24).

and the field installations were only carried on under appellant's (Recold) guarantee that if the units did not work satisfactorily they would be replaced at the sole expense of appellant Recold (Tr. 53-54).

Recold then in connection with its exploitation of the Quick defrosting system and as a necessary adjunct thereto, built a number of demonstration units one of which is Exhibit 15 before this Court to demonstrate to its distributors and customers throughout the country the operation of the Quick method of defrosting and as a necessary adjunct to the instruction of these people that such system would work which was then contrary to the beliefs of those engaged in this art.

Mr. Peter H. Askew, President of Thermal Products, Incorporated, one of Recold's distributors, testified with respect to his purchase of a demonstration unit like Exhibit 15 and as to its use and demonstration, stating the reason therefor:

> "Because there was a lot of skepticism on the sale of this system to the contractors. We had lots of opposition to overcome." (Tr. Vol. 2, page 87).

The reason for this skepticism is demonstrated by the teachings of the art as shown by the published literature heretofore reviewed and in the belief that this system of hot gas defrosting required complete re-evaporation of the liquid refrigerant formed during defrosting before the refrigerant could be returned to the compressor. As demonstrated by Exhibit 15 the liquid refrigerant formed during defrosting is not evaporated before it is returned to the compressor. Exhibit 15 demonstrates the fallacy of this belief and demonstrates that by metering the liquid refrigerant back into the gaseous refrigerant at a controlled rate the compressor will operate without

danger of destruction. And this was the point on which the art required demonstration before it was willing to accept the Quick solution of the problem of defrosting.

The publications in this art which are almost contemporaneous with the introduction of the Quick invention to the trade significantly still taught in 1955 and as late as 1957 the necessity of providing for complete re-evaporation of liquid refrigerant when utilizing the hot gas defrost system. Kramer-Trenton Company in 1956 published its brochure entitled "Kramer presents a new kind of THERMOBANK" (Exhibit 6D), the entire thesis of which is the making available of a greater quantity of heat in the heat bank in order to be more certain that the liquid refrigerant produced during defrost is completely re-evaporated, stating in part:

> " . . . This makes available vastly more heat for fast and complete elimination of liquid refrigerant slugging during defrost." (Exhibit 6D)

Although Kramer-Trenton had the advantage of inspection of the Recold demonstration unit of Exhibit 15 at the Atlantic City Show in June 1955 a further paper was prepared by Otto J. Nussbaum on "Automatic Defrost" which was presented at the June 3 to 5 Meeting of the American Society of Refrigeration Engineers in Miami Beach, Florida, which again reviews the method of defrosting with particular emphasis on "re-evaporation" and re-evaporators and the necessity thereof. This paper (Exhibit 6D) establishes the fact of the long existence in the art of hot gas defrosting and the fact of its patenting in Germany in 1888, establishes the problem of that system of defrosting, establishes that the hot gas system of defrosting met with little success in the art as stated by Mr. Nussbaum:

> " . . . Further progress was slow until 1945 when automatic hot gas defrost, using re-evaporation, was introduced . . . " (Exhibit 6B, page 1, first column).

Obviously Mr. Nussbaum and Kramer-Trenton Company were not willing to even then accept the fact as was demonstrated to them by the Recold Exhibit 15 demonstration that such a system was commercially feasible or operable under varying conditions required to be met by refrigeration apparatus so it is significant that Mr. Nussbaum in his article thus presented in 1957 still teaches the necessity of complete re-evaporation of liquid refrigerant, makes no mention of the Recold demonstration which he had observed but still adheres to the belief of the requirement for complete re-evaporation of the liquid refrigerant when using the hot gas method of defrosting which can be no more evident from a complete review of this article than the summary thereof which states:

> "(4) Complete re-evaporation—therefore positive compressor protection from foodback." (Exhibit 6A, last page)

As previously stated the publications of the art which appeared in 1955 were graphic in their demonstration of the danger which lies in the use of the simple hot gas defrost method. In the article entitled "Ammonia Liquid-Return Systems" written by W. F. Stoecker, Mechanical Engineering Department, University of Illinois, which was printed in Industrial Refrigeration in December 1955, Exhibit 32, there is pictorially illustrated the danger resulting from liquid refrigerant feedback to the compressor and in this respect this article teaches:

> "Since our ultimate aim is to protect the compressor, the solution to the liquid carryover problem may be to evaporate any liquid which does escape the evaporator before it reaches the compressor. (Exhibit 32, page 14, column 1).

This publication recognizes and is relied upon by appellees herein to show the use of an accumulator prior to the Quick invention. The accumulators which were used held the liquid refrigerant until it could be "boiled off". Thus, Stoecker states:

> "A simple device for protecting the compressor if the entrainment of liquid in the suction gas is of a small quantity for a short period of time, is to install a liquid accumulator in the suction line. Any liquid in the suction gas during the rare periods of carry-over collects in the accumulator and slowly boils off into the suction line. (Exhibit 32, page 14, first column).

One such system for avoiding the return of liquid refrigerant to the compressor is illustrated in Figure 3 of this article wherein the accumulator is connected with a liquid trap which is in turn connected with the refrigerant receiver normally receiving liquid from a condenser, and wherein liquid separated out of the suction line is drained by this method through a series of check valves back to the liquid refrigerant receiver. Certainly no one could read this article as prepared by this independent engineer without reaching the conclusion that it was essential to the satisfactory operation of a refrigeration system using hot gas defrost to insure that liquid refrigerant was not returned to the suction line to the compressor.

The Quick patent in suit in its specification and claims teaches and defines a system which is independent of "re-evaporation". This system includes what Quick refers to for convenience as an "accumulator trap", Quick patent, column 2, line 56. This accumulator trap first performs the function in the suction line during defrosting of separating the liquid and gaseous refrigerant present in the suction line, and as described by Quick, column 3,

lines 15 to 23, permits the gaseous refrigerant to return to the compressor substantially unrestricted. The liquid refrigerant is collected in the trap and held to be returned into the gaseous refrigerant at a controlled rate as described by Quick, column 3, lines 23 to 27 inclusive. This return of the liquid refrigerant at a controlled rate in the embodiments of the invention shown by Quick in his patent is accomplished through the use of a metering tube the lower end of which is in the liquid refrigerant in the accumulator trap. The metering tube is of a restricted size and permits the return of liquid refrigerant into the gaseous refrigerant flowing through the accumulator trap at a controlled rate. As described by Quick this rate is determinable by the size, length and degree of suction exerted in the metering tube and that this operation enables the liquid refrigerant to be returned to the compressor without "substantial re-evaporation".

Without Substantial Re-Evaporation

A considerable controversy in this action has resulted from the use of the word "substantial" which in its ordinary dictionary definition is:

> ". . . 6. Considerable; large; as, a *substantial* gain . . ." (Webster's Collegiate Dictionary, Fifth Edition, 1946, page 993)

and:

> ". . . 7. Considerable in amount, value, or the like; large; as a *substantial* gain. . . ." (Webster's New International Dictionary, Second Edition, Unabridged, 1954, page 2514)

The word "substantially" is used in the claims as a result of a discussion of the claims with the Patent Office Examiner at an interview had where there was present

Daniel D. Wile and the undersigned, attorney for Recold Corporation. The word "substantial" was introduced into the claims in recognition of the fact that no container can be set out in the open subjected to external atmospheric pressure and temperature without there being some evaporation of an evaporatable liquid from the interior. The same is true even of a glass of water set out in a room. In time the water will evaporate. The amount of water evaporating from that glass of water is not substantial at any one period of time and the amount of liquid refrigerant evaporating from the accumulator trap of the Quick invention is not material at or during the period of defrosting and return of the refrigeration system to normal refrigeration operation. In other words, what is really implied by the word "substantially" here is that the large or considerable part of the refrigerant collected in the trap is not evaporated and that the system is not dependent upon such evaporation for its functioning but differentiates from evaporation or re-evaporation as the art was taught at that time by the fact that the system operates with return of the liquid refrigerant to the gaseous refrigerant at a controlled rate so that the liquid refrigerant is not returned to the compressor in the suction line at any time as a slug of liquid refrigerant of sufficient magnitude as to cause damage to the compressor. It was this differentiation which was made to the Patent Office Examiner. The words "substantial re-evaporation" was inserted at the Examiner's suggestion to differentiate from the prior art, the operation of which was dependent upon and the teachings of which were that to operate such a system required complete re-evaporation of the liquid refrigerant. It is essential to the consideration of the claims of the Quick patent that this requirement of "without substantial re-evaporation" is with reference to what occurs

in the accumulator trap. Thus, for example, claim 3 states:

> ". . . the liquid refrigerant in said chamber being metered into said outlet leg at a controlled rate to return normally as a stream of gas and liquid to said compressor without substantial re-evaporation of said liquid."

This requirement of "without substantial re-evaporation" has no reference to what may occur after the refrigerant leaves the accumulator.

We therefore approach the prior art and the judgment of the District Court to consider whether the prior art follows the teaching of the publications of this art and the belief of this art as of the time of the Quick invention or whether the prior art teaches that in a defrosting system where large quantities of liquid refrigerant are produced as in commercial operations, systems could operate without re-evaporation of the liquid refrigerant or in accordance with the Quick concept of returning the liquid refrigerant into the gaseous refrigerant at a controlled rate so that the two travel directly to the compressor and are there subject to recompression without danger of damage to the compressor. And as to whether or not these systems of the prior art teach the Quick invention so that the art at 1955, the time of the introduction of the Quick invention to the trade by appellant Recold Corporation, had knowledge of the Quick invention. It is submitted that the published art hereto considered demonstrates the contrary. *Cee-Bee Chemical Co., Inc. v. Delco Chemicals* (C.A. 9, 1958), 263 F.2d 150. The presumption of validity can be overcome only by clear and convincing proof. *Patterson Ballagh Corp. v. Moss* (C.A. 9, 1953), 201 F.2d 403, 406. In sustaining such burden the prior patents and publications cannot

be reconstructed in the light of the patent in suit. *Payne Furnace & Supply Co., Inc. v. Williams-Wallace Co.*, 117 F.2d 823 (C.A. 9, 1941).

In its findings the District Court predicated its judgment primarily upon the disclosures of the patents to Kettering No. 1,978,463, issued October 30, 1934 (Findings 10, 11, and 12); British Patent No. 554,807, issued July 20, 1945 (Finding 13); the articles by Thomas H. Hart, published February and March 1951, Exhibits P and Q (Finding 14); the accumulator tank used in the Thermobank system as an adjunct thereto (Findings 18 and 20) and including the trap shown in the Nussbaum patent No. 2,564,310 (Finding 20); and the Pabst Patent No. 2,589,855 (Finding 22).

Consideration of the published printed art requires an understanding of and a concept of what is described and illustrated in these patents relied upon as prior art. Where there is no ambiguity, no difficulty of comprehension or understanding of the disclosures of such prior publications or patents, this Court is just as competent to evaluate those disclosures and statements as the lower court. *National Lead Co. v. Western Lead Products Co.*, (C.A. 9, 1961), 291 F.2d 447. The findings of the lower court with respect to specific patents in which there is no particular construction or interpretation placed upon such patents in the judgment or specifically shown by the findings, and where no ambiguity is found or asserted, are not findings of the character which must be accepted unless "clearly wrong". The rule of interpretation of the prior publications and patents is also that the patents or publications which were considered by the Patent Office and which are overcome by the patentee in obtaining the grant of his patent when considered by the Patent Office are not anticipatory and do not invalidate the patent granted unless it is specifically shown that the Patent

Office erred in its consideration of such references. *National Sponge v. Rubber Corp.*, 286 F.2d 731, 735 (Reversing D.C. S.D. Cal. C.A. 9, 1961).

In this case there was extensive evidence offered with reference to certain interviews had at the Patent Office prior to the grant of the patent and an offer was made to prove through the witnesses attending such interview the patents that were specifically discussed and considered at such interview. The District Court in effect discarded and refused to consider or receive this evidence. The evidence adduced from what was discussed with the Examiner was as stated by Mr. Wile (Tr. Vol. 4, page 427, lines 15-21):

> "Q Was that discussion had, do you recall, with reference to the Thermobank system and the other art cited?
>
> A Well, the Thermobank system along with the other art was discussed as examples that the industry or that the art had taught, re-evaporation in this type of a defrost system that some form of external heat or re-evaporation was necessary."

It was at this interview that the witness, Mr. Wile, exhibited to the Patent Office Examiner the photographs, Exhibits 14A through 14E, which showed the operation of the experimental set-up at appellant Recold's place of business and demonstrated the operation of the Quick invention similar to the operation or demonstration made by Exhibit 15 (Tr. Vol. 5, pages 470-472).

In the examination of Mr. Wile, he was referred to the file wrapper of the patent in suit, Exhibit C, page 61 thereof, which has reference to the interview had with the Examiner at which the witness Wile was present and which states:

> ". . . Such accumulators are shown in the Nussbaum Patent No. 2,530,440, granted November 21, 1950; the Kleist Patent No. 2,701,455, granted February 8, 1955 on an application filed July 23, 1952; the McGrath Patent No. 2,675,783 filed June 22, 1950, and others."

This affidavit was discussed and its contents were discussed with the Examiner at the interview or interviews where the witness Wile was present. The witness was asked whether there were such others as referred to in the above quoted material and whether or not such others were exhibited to the Patent Office Examiner and the witness replied: "There were".

The witness prepared a list of these patents which were discussed with the Examiner and the list was presented. The witness was prevented from stating what those others were or as to the discussion had with reference thereto by the Court sustaining an objection (Tr. Vol. 8, page 827), at which time on behalf of plaintiffs an offer of proof was made to prove that each of the patents included upon the list prepared by the witness was a matter of discussion with the Examiner of the Patent Office at the time of said interviews and that the list included the patent to Kleist No. 2,701,455; the patent to Smith, No. 2,787,135; the patent to Warneke No. 2,291,363; the patent to Kramer No. 2,440,146, Exhibit JJ; the patent Winkler No. 2,512,758; the patent to Swart No. 2,614,402, Exhibit JJ; the patent to Kettering No. 1,978,463, Exhibit II; the patent to Hanson No. 2,801,523, Exhibit JJ; and the patent to Nussbaum No. 2,564,310, Exhibit II (Tr. 8, pages 828, 829).

After sustaining this objection made to the witness' testimony with respect to the others that were considered by the Patent Office the District Court finally ruled in

effect that the patents contained upon said list and the witness' testimony with reference thereto and as to their having been considered by the Patent Office was admitted subject to the right of counsel of appellees to cross-examine with reference thereto, the understanding being reached with the Court as stated in the transcript at page 840 with respect to the reservation of the right to examine with respect to these "and others" patents. The record will show that subsequent thereto these patents were thoroughly considered by both plaintiffs and defendants in their examination of their experts. It was, therefore, thoroughly established that the particular patents included on this list as herein identified were considered at the time of the presentation of this matter to the Patent Office Examiner at the interview which is directly contrary to the findings of this Court (Finding 12, Tr. Vol. 8, page 826). Also contrary to this evidence is the statement in Finding 20 that the Nussbaum patent No. 2,564,310 was not considered by the Patent Office. These findings are specifically not true. Specifically set before the Patent Office in addition to these Patent Office references is the literature with respect to the Thermobank system, the Nussbaum Patent 2,440,146 of April 20, 1948, and the article by Thomas H. Hart of March 1951 entitled "Hot Gas Defrosting in Commercial Refrigeration", Part II, Exhibit Q, as well as the article which appeared in Industrial Refrigeration of December 1959 written by W. F. Stoecker of the Mechanical Engineering Department of the University of Illinois, Exhibit 32, File Wrapper Exhibit C, page 75, all of which enunciate the claim or teaching of the art of total re-evaporation through the use of extraneous heat as the only means of avoiding the slugging of the compressor. And the distinction was clearly made throughout this presentation to the Examiner of the Quick invention that it differentiated from all known art in its departure from that

teaching that complete re-evaporation was essential to the successful operation of the hot gas defrost system but that the patentee Quick had discovered and proven that he could re-introduce the liquid refrigerant into the gaseous refrigerant at a controlled rate and that when so mixed and controlled the hot gas system was capable of successful operation without danger of damaging the compressor. And in so making this distinction with this long-standing problem relied before the Patent Office upon the Supreme Court's holding in *Diamond Rubber Company of New York v. Consolidated Rubber Tire Company,* 220 U.S. 428, 55 L.ed. 527 at 531 (File Wrapper Exhibit C, page 77). It was after this presentation that the Patent Office, after considering this art, the same art as was before the District Court, including the same teachings, allowed the Quick patent in suit when the distinction was clearly pointed out, as is hereto above referred to, that the difference between the Quick invention and the art lay in the Quick discovery that he was not dependent upon re-evaporation of liquid refrigerant in his holding accumulator but could operate without substantial re-evaporation of that liquid in the holding accumulator and introduce at a controlled rate the liquid refrigerant into the gaseous refrigerant and proceed therefrom whether or not there was re-evaporation or partial re-evaporation of the liquid refrigerant after leaving the trap or holding accumulator, and in this regard pointed out to the Examiner:

> "By the foregoing as discussed at this interview, it was pointed out that there may be a partial re-evaporation of the liquid refrigerant after leaving the trap before return to the compressor due to the fact that the return line is normally extended through the atmosphere at which time there will be some heat absorbed by the refrigerant which will re-

> evaporate a portion but not a substantial portion of the liquid refrigerant in the stream of gas and liquid returned to the evaporator. (File Wrapper Exhibit C, page 91, last paragraph, to page 92, line 1).

It is also evident that there was discussed before the Examiner the so-called "L" Thermobank of the Kramer-Trenton Company, which is the Thermobank system described in the patent to Nussbaum No. 2,440,146 of April 20, 1948, and the article written with reference thereto as it appeared in Commercial Refrigeration and Air Conditioning, November 1955, and which states:

> "The 'L' Thermobank incorporates a new heat source for unfailing defrost and completely eliminates any liquid slugging during defrost." (File Wrapper Exhibit C, pages 74 and 75).

Testing by the foregoing, does the art negative invention in the Quick patent within the rule laid down by our Supreme Court in *Diamond Rubber v. Consolidated Rubber Tire Company,* 220 U.S. 428, *supra*? Giving to the art the full benefit of its teaching it is obvious that without the Quick patent no one would adduce from the art that the hot gas method of defrosting could be operated without re-evaporation.

The Kettering patent does not deal with hot gas defrosting and nowhere mentions any defrosting method or manner of defrosting. It may be assumed, as this patent was apparently directed to a household refrigerator operating at above freezing temperature, that the reason is clearly found in the fact that like many refrigerators at that time of the domestic type, the operation of the refrigeration apparatus was merely discontinued and allowed to stand idle until the warm air had melted any frost that might accumulate upon the ice tray form of evaporator 12 shown in this patent. Any other con-

clusion with respect to what was intended in this patent is further amplified by the comparison of the accumulators of Figures 1 and 2 which are taught by Kettering to be equivalent and interchangeable in their function and operation in the system which he discloses. Obviously, the only way that any substantial quantity of liquid refrigerant could get out of the trap shown in Figure 2 is by evaporation due to exposure of that container 40 to the warm air. The same is true with respect to the actual disclosure of this Kettering patent which, although it does disclose a form of accumulator in Figure 1 which in a high temperature refrigeration system would admit of the return of some liquid refrigerant to the compressor, it clearly does not and did not teach this art that anything found therein is usable in a hot gas defrosting system in a commercial sub-freezing temperature installation to handle the large quantity of liquid refrigerant then produced during defrosting so that it could be returned to the compressor without substantial re-evaporation in the accumulator.

This Kettering patent issued in 1934. It is significant that all of the reviews of the art, as shown through the exhibits hereinabove analyzed, including Exhibits 6A, 6B and the articles written by Hart, Stoecker and on behalf of Kramer-Trenton, completely ignore the disclosure of this Kettering patent. The art as hereinabove demonstrated was taught that in hot gas defrost operation where large quantities of liquid refrigerant were obtained in a defrosting operation total re-evaporation was essential. As a matter of fact and of law and within the holding expressed again by our Supreme Court in *Diamond Rubber Company v. Consolidated Rubber Tire Company,* 220 U.S. 428, where it is shown conclusively that this patent had no effect whatsoever upon this art or the solution of hot gas defrosting, the patent cannot

be considered as anticipatory within the doctrine laid down by the Supreme Court in the Diamond Rubber Company case which is particularly applicable here in the quotation derived therefrom at pages 434-435:

> " . . . Many things, and the patent law abounds in illustrations, seem obvious after they have been done, and, 'in the light of the accomplished result,' it is often a matter of wonder how they so long 'eluded the search of the discoverer and set at defiance the speculations of inventive genius.' *Pearl v. Ocean Mills,* 11 Off. Gaz. 2. Knowledge after the event is always easy, and problems once solved present no difficulties, indeed, may be represented as never having had any, and expert witnesses may be brought forward to show that the new thing which seemed to have eluded the search of the world was always ready at hand and easy to be seen by a merely skillful attention. . . . "

Although appellees' chief engineer was placed upon the stand and sought to demonstrate from this patent that the Quick invention was clearly described therein, it is significant that this same chief engineer and the author or participant in the authorship of the writings which appeared in 1945 to 1957 gave no hint to any solution to the hot gas defrosting problem other than "total re-evaporation". The effort made by Mr. Nussbaum while on the stand to read into other patents and other publications teachings or disclosures which are not therein found or to substitute this part of this disclosure of this patent for that part of that disclosure of that patent, in order to build up the teachings of the Quick patent, necessarily resulted in the change of operation and theory of operation, and is just the kind of testimony of an expert witness' elucidation of the prior art that the Supreme Court

had reference to in its 1911 decision in the *Diamond Rubber Company* case, where in the above quotation it refers to such expert witnesses and their skillful effort to revamp the actual teachings of the prior art in the light of what has been accomplished. *Mohr v. Alliance Securities Co.,* (C.A. 9, 1926), 147 F.2d 799, 800. Nussbaum's retroactive thinking is contrary to his writings. These appellants ask this Court to compare Nussbaum's written articles with his testimony given on the stand. Is it true that Kramer-Trenton and Nussbaum were suppressing their experiences or what they had learned in the art through the use of the Kramer-Trenton Thermobank system? If so, there is certainly no illustration of their teachings or uses of accumulators in any of the written articles either by Israel Kramer or by Mr. Nussbaum. What Mr. Nussbaum now says Kramer used is also not shown in the contemporaneously filed patent application. Two reasons for this may be advanced, (1) they did not work; and (2) they were concealed, suppressed, or abandoned. No one came forward to establish either knowledge of the use or that the alleged use was successful. If it were not for Quick the answer is obvious, and that is, no one would have ever heard of the alleged Kramer accumulator use. Such an alleged use cannot be considered as anticipatory within the provisions of 35 U.S.C., § 102(g) which specifically condemns abandonment, suppression, or concealment and excludes material which has been so abandoned, suppressed, or concealed from anticipatory effect of a later invention.

The Kettering patent had specifically been considered by the Patent Office Examiner at the oral interviews had prior to the grant of the Quick patent in suit. Its differentiation from the claims and from the invention of the Quick patent is quite clear. It was issued in 1934 and certainly did not teach the Quick invention which came

into being in the latter part of 1953. In the approximate twenty years intervening, it is shown to have had no effect whatsoever upon the art and upon the beliefs of the art, as those beliefs and concepts are shown by the published literature.

The Nussbaum Patent No. 2,564,310, Granted August 14, 1951, Exhibit II

This patent is directed to a means for controlling the head pressure in refrigerating systems and is really directed to what is known as the Kramer-Trenton presentation of its merchandise to the market as its "Winter Control". It is directed to a valve system and a system of bypass conduits associated with the condenser and the receiver through the medium of which there is maintained in accordance with existing temperature conditions, restricted flow of refrigerant from the compressor 1 to the liquid refrigerant receiver 5 in accordance with conditions existing within the condenser 3. It does deal with a hot gas defrost operation as it indicates in the modification of Figures 4 and 5 a bypass line 31 for bypassing hot gas from the compressor to bypass the condenser 3, receiver 5, and expansion valve 7 for the purpose of defrosting the evaporator 9. It recognizes again the problem existing in this art of slugging the compressor and shows in the suction line a container or accumulator 35 having a bottom inlet and a top outlet which would thereby form a trap to hold liquid refrigeration from flowing to the compressor 1 during the defrosting operation. It is this trap that the Hart article, Exhibit Q, warns against in stating "should not be trapped for a trap in the suction line would quite likely produce a slug", etc.

There is no indication in this patent of any structure used or suggested by Nussbaum other than this simple

trap containing a bottom inlet and a top outlet as is evident from both Figures 4 and 5 of the drawings of the Nussbaum patent. The only description of this holding accumulator is contained in column 6, lines 30 to 60, inclusive, wherein the particular function is described and in which it is particularly pertinent to note that Nussbaum describes that the liquid refrigerant which enters the tank 35 is to be vaporized therein before it is allowed to pass out of the tank 35. This again is what Hart states in Exhibit Q. Thus, Nussbaum states:

> ". . . This is accomplished by causing liquid to enter the lower part of the accumulator tank 35 and be vaporized therein before it is withdrawn therefrom by suction to the compressor. This vaporization will take place within the tank because refrigerant fluid is normally volatile, and such vaporization will be accelerated if any source of warmth, such, for instance, as sunlight, acts upon the accumulator." (Nussbaum Patent 2,453,310, column 6, lines 53-61).

Review of the remainder of the specification for any further description of the mode of operation and purpose of the accumulator tank will show a similar teaching by Nussbaum in column 7, lines 19 to 23, which reiterates the teaching that the liquid refrigerant is only withdrawn from the accumulator as a gas. The statement is:

> ". . . The defrost step condenses this gas which flows as a liquid to accumulator 35, is there vaporized, and then drawn into the compressor in the form of gas during continued operation of the system."

The teaching of Nussbaum as to the operation of the accumulator tank 35 is therefore that the liquid refrigerant is drawn into the tank during the defrosting operation and therein, i.e., in the trap, is completely vapor-

ized before it is allowed to return to the compressor. In fact, in the absence of a metering tube not shown by Nussbaum, no other operation could take place because there is a gap between the bottom inlet and top outlet of the accumulator 35 and unless the tank 35 was flooded to overflowing only gas could leave this tank 35. The disclosure of this patent cannot as a matter of law be amplified by its inventor as is here sought to be done to include therein something which is not there shown and which is in fact directly contrary to the plain words and meaning of the disclosure of the patent. *Carson v. American Smelting & Refining Co.* (C.A. 9, 1925), 4 F.2d 463; and *Pursche v. Atlas Scraper and Engineering Co.* (C.A. 9, 1962), 300 F.2d 467. This patent was, as has heretofore been shown, considered by the Patent Office Examiner, and the portions of the specification hereinabove quoted in detail were made known to the Examiner. This patent does not disclose the mode of operation involving the Quick concept of separating the gaseous refrigerant from the liquid refrigerant during defrosting operation and then feeding the liquid back into the gaseous refrigerant at a controlled rate without substantial volatilization of the liquid refrigerant in the accumulator, the heart of the Quick invention, and cannot now be reconstructed to make it include something which is not clearly defined therein. The reason for this is obvious in that it would not so teach any one skilled in the art that it had solved the problem or that it had the mode of operation or method of the Quick invention. This Nussbaum patent is not ambiguous, its teaching is clear, and the law is well established that its teachings are from its own words and drawing, not from something ingrafted thereon by a skillful expert.

It is fundamental in this regard that if Kramer-Trenton or Nussbaum at any time ever employed an

accumulator tank in its system as an adjunct to the Thermobank system at a time prior to the filing date of this Nussbaum patent, the failure to illustrate the same in Figures 6 and 7 of this patent is conclusive evidence that the accumulator used was like the accumulator tank 35 of Figures 4 and 5 of this patent and had the same operation, that is, of holding the liquid refrigerant until it evaporated or was "boiled off". In Figures 6 and 7 there is defined in the same manner as the Thermobank operation of a patent No. 2,440,146 referred to in column 7, and there is the same teaching as heretofore pointed out with respect to the other modifications of this invention where hot gas defrosting is indicated, and that is:

> ". . . The heat of the tank vaporizes the fluid so that it may be drawn as a gas through pipe 55 to the intake of the compressor." (Column 8, lines 32-35).

It is alleged that at this time and at the time of the filing of this application Kramer-Trenton had utilized as an emergency measure a different form of accumulator tank as shown in the drawings of this patent No. 2,564,310, and it is alleged that where difficulties were encountered in the use of the Thermobank system because of inadequate capacity to handle the liquid refrigerant during defrost such accumulators were added to the system to hold the liquid refrigerant which might splash over from the Thermobank system and these accumulator tanks acted as a means of protecting the compressor from slugging. It is alleged that such accumulator tanks are shown, for example, in the drawing, Exhibit F, dated September 7, 1945, and that certain installations were made using such accumulator tanks. It is alleged that the surge tank illustrated in this drawing Exhibit F is of the form shown in the Kramer-Trenton drawing dated June 9, 1947, Exhibit G, and that such

surge tank had an oil return line in its bottom portion when installed in the refrigeration system in the manner as illustrated in the drawing, Exhibit J, dated April 11, 1947, and that that oil line would permit some quantity unspecified of liquid refrigerant to flow out of the surge tank to reach *the suction line* and be completely vaporized in the suction line before it returned to the compressor. It is submitted that this combination, if it ever existed, does not meet or suggest the invention of the Quick patent in suit because it is still primarily dependent upon the volatilization of the greater portion of the liquid refrigerant in the surge tank, and certainly if any such system existed it did not teach the art, nor even Kramer-Trenton Company, that a hot gas defrost system could be operated which was not dependent upon re-evaporation of the liquid refrigerant before that refrigerant was permitted to return to the compressor. It is further submitted in this regard, however, that there is no adequate proof that any such system as illustrated by the foregoing exhibits ever existed or was used within the requirements of proof laid down in the Barbed Wire Patent Case, 143 U.S. 275, 36 L.ed. 154. The character of proof offered in this case as to the existence of any such system by Kramer-Trenton Company is of the precise character condemned by the Supreme Court in the Barbed Wire Case. The proof proffered of this alleged use totally lacks corroboration and is dependent from the testimony of Otto J. Nussbaum alone. The alleged use is contrary to the disclosure made by Nussbaum in, for example, the Nussbaum patent No. 2,564,310, Exhibit II, which was filed at a time contemporaneous to the alleged use. It is also contrary to the spirit of the requirement of the patent law in that if in fact any such use did exist it was abandoned, suppressed, and there is no disclosure thereof to any one outside of the Kramer-Trenton Company. If there was such a disclosure the record totally

lacks evidence thereof. No user or alleged user of such a system was called to corroborate its existence. The patents which were filed on behalf of the Kramer-Trenton Company carefully avoid mention thereof so that it is evident that the proof is insufficient within the Barbed Wire Case and in fact is susceptible of condemnation within the provisions of 35 U.S.C., § 102(g) as having been abandoned, suppressed, or concealed. Such fact of abandonment, suppression or concealment is best tested by the fact that if the Quick invention had not been made available to the public through the efforts of Quick and appellant Recold and by the public demonstrations thereof made, for example, to Kramer-Trenton Company and Nussbaum through the demonstration of the demonstrator of Exhibit 15 so that Kramer-Trenton was able to copy the system developed by Quick and Recold, the public would never have learned, as far as the evidence before this Court is concerned, of the alleged use of the system as allegedly made, including the instrumentalities illustrated in Exhibits F, G and J. No person other than Nussbaum testified before this Court as to the existence of any such system and he clearly failed to include any such system within the disclosures of any of the patent applications which he filed subsequent to the alleged use. This is a simple case falling within the condemnation of this type of evidence by the Supreme Court as set forth in the Barbed Wire case, 143 U.S. 284, 285. There is another positive statement included in the published statements of the Kramer-Trenton Company that belies the purported operation alleged to have been performed by the use of the elements as combined in the above identified drawings and which is dependent upon the use of an oil return line as a means of returning some liquid refrigerant to the suction line and that is as found in the disclosure made in the article prepared by Israel Kramer and which the witness Nussbaum testified he

participated in, i.e., the statement made by Israel Kramer that the oil return line is sized so that in its position of use in the Thermobank system that liquid refrigerant will not and does not pass therethrough into the suction line. Thus, Mr. Kramer, President of Kramer-Trenton Company, and who incidentally was not called as a witness by appellees, although available to be called, states in his article, Exhibit 6A, on the 6th page thereof, last paragraph:

> " . . . At the bottom of the inner tank there is also provided an oil drain connected to the oil sump of the compressor, to return whatever oil is deposited by the refrigerant going through the inner tank. This line is small in diameter, just sufficient to permit the return of oil without allowing liquid refrigerant to drain into the compressor suction."

Thus, in Figure 12 upon this page 6 of the article, Exhibit 6A, the oil return line is shown at 6 coming from the bottom of the tank and corresponds to the line of Exhibit F shown at 6 coming from the bottom of the inner tank and labeled oil return and where there is shown a similar line connected into this oil return from the surge tank.

Again, if we take the teaching of this purported evidence alleged to anticipate or negative the invention of the Quick patent, and analyze its entire teaching to the art, we must come to the same conclusion as was made evident to the Patent Office during the prosecution of the Quick application, that the art was convinced prior to the Quick invention that a system to operate must so operate that it will, as stated by Mr. Kramer in Exhibit 6A, page 5, thereof:

> " . . . In order to achieve a completely automatic defrosting system with hot gas, a supply of heat must be instantly available for defrosting under all

conditions of operation in order to re-evaporate the condensed refrigerant before it enters the suction valve of the compressor."

If such teachings were casual and isolated they might possibly be subject to explanation but where they permeate each and every article written by, publication of and patent application or patent granted to the Kramer-Trenton Company they cannot be explained away as in the manner sought by the witness Nussbaum. The testimony thus given is amply illustrated in the Barbed Wire Case as the testimony of an interested witness prodded into activity by the necessity of the case in question, and where there is total lack of corroboration were available, it cannot be accepted as proof of the guantum or character required to establish the fact of any use, teaching or knowledge:

> " . . . have required that the proof shall be clear, satisfactory, and beyond a reasonable doubt . . . " *Barbed Wire Patent* 143 U.S. 275, 284.

The Marshall Patent No. 1,594,422, Granted August 3, 1926

This patent to Marshall granted in 1926 on an application filed December 4, 1924, discloses a "small scale trap" shown in Figure 1 at 7 in the suction line. It teaches that the use of such a small scale trap in the suction line was old and had been used prior to Marshall's purported invention and states precisely its purpose:

> " . . . Ordinarily, the small scale trap that is interposed in the return line from the expansion coils is sufficient to intercept such slugs of liquid and hold them until they re-evaporate . . . " (column 1, lines 7-10).

This is the same as taught by Hart, Exhibit Q, 27 years later. The patent is purportedly directed to the imposition in the suction line, as shown in Figure 1, of a choke diaphragm 8 the purpose of which is to impede the flow in the suction line to insure such re-evaporation and to the use of a scale mechanism shown in Figure 2 which will weigh the system so that as the quantity of liquid approaches the danger point such that some of it might be returned to the compressor, the operation of the compressor will be discontinued by shutting off the motor driving the same until sufficient of the liquid refrigerant is returned to a tank 11 under the influence of a pump 13 and is then returned to the receiver so that it cannot reach the compressor 4. The teaching of this patent is of a system of draining, scale, and switch mechanism operated by the scale to insure there is no possibility of liquid refrigerant flowing into the suction line 3 to the compressor 4. The liquid refrigerant is returned to the receiver, bypassing the compressor. The liquid refrigerant in the patent is not metered into the gaseous refrigerant and the gas returned to the compressor.

The Marshall patent does not disclose the Quick invention but teaches exactly what was represented to the Patent Office with respect to the prior art and knowledge thereof that all effort must be made to insure complete re-evaporation of or withdrawal of liquid refrigerant from the system so that no liquid refrigerant could reach the compressor. The patent does not deal with nor disclose any means for defrosting and certainly does not teach the art that in the use of the hot gas defrost system the liquid refrigerant could be metered back into the gas flowing through the suction line without substantial re-evaporation and thus as it is dispersed in the gas be handled by the compressor without liability of damage to the compressor. It does teach the necessity of the

re-evaporation of the liquid refrigerant or the withdrawal of the liquid refrigerant while stopping the compressor, page 1, column 1, lines 24 to 28. There is no accumulator operating through the medium of a metering tube to return liquid refrigerant to the gas in the suction line.

The Pabst Patent No. 2,589,855, Granted March 18, 1952

This patent was thoroughly considered by the Patent Office Examiner before allowance of the claims to Quick as shown in the file wrapper Exhibit C. The manner in which this patent fails as a disclosure of the Quick invention was particularly pointed out to the Examiner in the manner set forth on pages 90-91 of the file wrapper. There are two Pabst patents, both of which were considered at this interview, as is stated on page 91 of the file wrapper:

> ". . . It was further pointed out at this interview that the Pabst patent, 2,589,855 is stated to be a modification of the disclosure of the Pabst patent, 2,525,560 only in the manner of picking up the refrigerant in the refrigerant receiver before it is passed through the element 7 which, as previously stated, is then operated as an evaporator as compared with the method of picking up the refrigerant from the receiver as disclosed in the prior Pabst patent, 2,525,560.

There is no accumulator provided with a metering tube. There is no flow of liquid refrigerant to the compressor with the refrigerant gas. In accordance with this Pabst patent the refrigerant coming from the evaporator normally passes through the line 4 into the liquid refrigerant receiver 10 located below the condenser 7. That there can be no flow of refrigerant through the pipe 4 back into

the condenser 7 to the compressor is obvious. The very function of the condenser 7 is to condense gaseous refrigerant to liquid refrigerant which is then deposited in the receiver 10. The only purpose of the brake between the tube 9 and the line 4b is to equalize the pressure in the system and as stated by Pabst in his patent as such pressure is relieved there will be little or no back pressure on the flow of the refrigerant which could possibly account for the flow of liquid refrigerant back through the condenser 7 to the intake of the compressor 12. Thus, Pabst states:

> ". . . As the pressure of the air in the receiver or reservoir is thus relieved, little or no back pressure on the flow of the refrigerant from the evaporator to the receiver will retard such flow." (Column 3, lines 3-6).

It is significant to note that at all times the claim of invention presented to the Patent Office Examiner and accepted by the Patent Office Examiner in the granting of the Quick patent was as stated in the final amendment presented to the Examiner just prior to allowance in which, on page 90, it is stated:

> "It was urged by counsel at this interview that there was no reference of record which taught the art that hot gas defrosting could be accomplished without re-evaporation of the refrigerant which was condensed in the evaporator during defrosting operation. . . ." (File Wrapper Page 90).

This is what the Examiner and the Patent Office accepted as the invention of the Quick patent and as defined in the claims before this Court. The claim made to the Examiner by counsel to obtain the allowance of this patent is the same claim and same position taken by counsel before this Court and as here demonstrated.

The British Patent No. 554,807 to The British Thomson-Houston Company, Limited, of July 20, 1943

This British patent in accordance with the law must be construed only as to what is clearly and positively disclosed therein, and not by what might be made out of it. This rule is stated by the leading case of *Carson v. American Smelting* (C.A. 9, 1925), 4 F.2d 463 and was recently applied by this Court in *Pursche v. Atlas Scraper and Engineering Co.,* (C.A. 9, 1962), 300 F.2d 467. In reversing the District Court this Court stated in the *Carson* case:

> "A foreign patent is to be measured as anticipatory, not by what might have been made out of it, but by what is clearly and definitely expressed in it. An American patent is not anticipated by a prior foreign patent, unless the latter exhibits the invention in such full, clear, and exact terms as to enable any person skilled in the art to practice it without the necessity of making experiments. (Citing cases) In Westinghouse Airbrake Co. v. Great Northern Ry. Co., 88 F. 258, 31 C.C.A. 525, the court said: 'The prophetical suggestions in English patents of what can be done, when no one has ever tested by actual and hard experience and under the stress of competition the truth of these suggestions, or the practical difficulties in the way of their accomplishment, or even whether the suggestions are feasible, do not carry conviction of the truth of these frequent and vague statements.'" (Page 465)

This British patent relates to a system for maintaining a supply of liquid refrigerant in the evaporator so that the evaporator will not be starved at a period of time after stopping the compressor for any reason, and pro-

vides for the positive prevention of the flow of liquid refrigerant into the suction line. This patent discloses no consideration of the problem of dealing with liquid refrigerant during a defrosting operation. It does not show nor describe hot gas defrosting and the reason for this is obvious. The patent is dealing with small refrigeration operations of the household refrigerator type which is operating above freezing temperature. The whole purpose of the apparatus is to make available a supply of liquid refrigerant in a holding tank for evaporation in the evaporator so that the refrigeration operation is not delayed after stopping of the compressor for any reason on the restarting of the operation. The purpose of the arrangement as shown in this British patent is as stated on page 3, first column, lines 17 to 24:

> ". . . In order to provide refrigeration throughout the conduit 23 when operation of the compressor is resumed, we construct the header 24 so that it acts as a liquid trap during the 'off' period of the cycle and so that it supplies liquid refrigerant to the conduit 23 as soon as the compressor is started.'

The conduit 23 is the refrigerant circulation pipe or conduit of the evaporator. The purpose of the header 24 is to store liquid refrigerant so that it is at all times available for re-evaporation into the conduit 23. The purpose of the element 25 as shown in Figure 4 is also described and it is here stated that the primary purpose of this structure is to insure return of oil separated from the refrigerant to the suction line so that it may be returned to the compressor while the container 25 being in heat exchange relationship the liquid refrigerant separated in the tank 25 will be evaporated, leaving the oil to be carried with the vaporized refrigerant to the compressor, as is described in this British patent, column 3, beginning

at line 84 and continuing through to line 2 of the first column of page 4.

The use of heat as a medium of preventing liquid refrigerant from leaving the tank 25 is described in this portion of the British patent as follows:

> ". . . This separation is accomplished in the heat exchanger 16, 18 since the liquid mixture will absorb heat from the hot liquid in the capillary tube 18, which is in heat exchange with the suction line 16, and the liquid refrigerant will thereby be vaporized leaving the oil which is carried with the vaporized refrigerant to the compressor."

This patent does not even mention the problem sought to be solved by the patentee Quick, let alone disclose a solution thereto. As it is neither concerned with nor discloses a solution of the Quick problem, it is clearly not anticipatory nor is it effective as showing lack of invention and it cannot be used by modification or alteration or change or addition in support of a claim of obviousness as is evident from the rules with respect to construction of foreign patents as stated in the *Carson* case, *supra.*

The Hart Publications of February 1951 and March 1951, Exhibits P and Q

The Hart publications were clearly before the Patent Office and Exhibit Q, the second portion of the continuing article, is clearly cited by the Patent Office and was discussed at the interviews had with the Patent Office Examiner, and referred to in the file wrapper Exhibit C, page 75, the substance of which is contained in the Brief on Appeal filed on behalf of Lester K. Quick. In this brief it is stated:

"The teachings of this art with respect to the use of the hot gas system of defrosting are exemplified very well in the articles appearing in the March 1951 issue of 'Refrigeration Engineering' entitled 'Hot Gas Defrosting In Commercial Refrigeration' and 'Part II — Practical Aspects Of Operation' by Thomas H. Hart, Chief Engineer of The Warren Co., Inc., Atlanta, Georgia."

The Hart article, Exhibit P, is a discussion of the use of the hot gas system of defrosting in small refrigeration operations, apparently open-top refrigeration showcases as shown in Figure 1 which are above freezing operations. It demonstrates that there is no problem in such small operations with the use of hot gas defrost because of the minimal amount of heat required to effect defrostings in such operations with the result that the amount of liquid refrigerant produced during defrosting will be about the same as if the hot compressed refrigerant were directed to the evaporator instead of to the condenser, stating:

" . . . Conversely, the compressor would have to operate about that same length of time to defrost the evaporator if the hot compressed refrigerant were diverted to the evaporator instead of to a condenser." (Exhibit P, page 140, 2nd column last sentence of the 4th paragraph).

This article does not suggest in any way the Quick invention and nowhere discloses the use of an accumulator trap with a metering tube or the method of operation in which the liquid refrigerant is held and then metered at a controlled rate back into the gaseous refrigerant so that the compressor is able to handle the mixture of liquid and gaseous refrigerant without damage to the compressor. No suggestion of this operation is made or

even hinted at. In fact, the entire thesis of Exhibit P is an attempt to refute the experience of the art that simple hot gas defrosting could not be used without danger to the compressor, and seeks to demonstrate where, under certain precise conditions of low refrigeration requirement, the hot gas defrost system has been used.

The Hart article, Exhibit Q, i.e., the March 1951 conclusion of Hart's presentation of hot gas defrosting is specific in its teaching that in the use of the hot gas defrosting system no trap should be used in the suction line, stating upon page 246:

> " . . . Second, the suction line within the refrigerated space should not be trapped for a trap in the suction line would quite likely produce a slug which would have to be evaporated before it reached the suction inlet of the compressor."

This article teaches that where any trap is used in the closed cycle of refrigeration it must be so used that the liquid refrigerant is boiled off in the trap, preventing any introduction into the suction line of liquid refrigerant, stating:

> " . . . The function of this device is to trap any slugs of liquid before they reach the compressor, regardless of the rate at which hot gas is metered into the evaporator, and retain this refrigerant until it has 'boiled off' from the combined action of the suction and the heat pick up through the wall of the device. . . . " (Exhibit Q, page 248, 2nd column, 3rd paragraph).

Again, it must be observed that Hart's entire consideration of a hot gas defrost system is predicated upon small refrigeration installations and this is clearly made apparent in his article upon page 248 where he states:

"Bear in mind that this article is being written about small, if not fractional, horsepower machines and the equipment is based on this type of installation. . . . "

In considering larger installations Mr. Hart in his article on page 249 thereof states the then known use of two systems employing hot gas defrost which are in reality the Thermobank system as defined in the second paragraph on page 249 as follows:

"The better known of the two is essentially a heat exchanger and accumulator enclosed within a brine tank and installed in the compressor discharge line between the compressor and the condenser. Diagram of such a system is shown in Figure 10. . . . "

The second known system of use in larger installations is where an electric heater is used to supplement the heat of the compressed gas as defined in the next to last paragraph of the first column upon page 249. And as pointed out to the Examiner during the prosecution of the Quick application no teaching can be gathered from the Hart articles other than that the simple system of hot gas defrost can be used in very small refrigeration installations where the heat required to defrost is relatable to the heat required for compression of the refrigerant during normal refrigeration operations and that where larger installations are employed using this system there must be some heat exchange system used to provide for re-evaporation of the liquid refrigerant produced during defrosting. Here the articles of Hart have two disclosures with respect to such operations, one of which is the use of the Thermobank hot brine system and the other is the use of an electric heater also for the purpose of heating brine to provide for complete re-evaporation of the liquid refrigerant. In Exhibit P the proof that this article

actually refers only to above freezing operations in the small installations referred to comes from the disclosure of the article that the operation of hot gas defrost is used merely for the purpose of knocking the frost off from the evaporator surface where it is allowed to fall in the pan. Thus Hart states on page 140 of Exhibit P:

> " . . . By thus breaking the bond from the inside with heat, it is possible to 'knock off the frost' without taking the time or energy to melt all of it completely." (column 2)

This operation can be performed in an above freezing operation where, after the frost is knocked off the evaporator, it falls into the refrigerant space into a container where it will subsequently melt because the air is at a temperature above the freezing point of water. In a below freezing operation it obviously could not be performed because the effect thereof would be to accumulate the ice, and the air being below freezing temperature, it would not melt and would soon operate to clog the entire system. This is one of the things learned from the operation of the water defrost system where great care had to be employed to drain all the frost out of the refrigerated space on each defrosting or the result would be the icing up of the entire system. Again, there is no assertion in this Hart article that the article discloses the Quick invention. On the contrary, the argument is made that by taking the disclosure of Hart that hot gas defrosting was possible and changing what is suggested in it for that which is derived from the asserted Kramer-Trenton 1945 use of an accumulator trap, a system would come into being which approximates the disclosure of the Quick patent. It is submitted that this method of building up an anticipation is only usable where it is possible to show that the art directed the interchange of the elements of the several disclosures

and there is clearly no such direction which can be pointed to in any of the publications or patents before this Court. In fact, there is no disclosure before this Court that the art, except that in hot gas defrosting systems the liquid refrigerant produced on the defrosting operation must be and is completely evaporated before it is admitted to the suction line. It remained for Quick to teach the contrary and to teach that the liquid refrigerant could be metered into the returning gaseous refrigerant and that the compressor could handle the mixture without liability of damage to the compressor. This is the system covered in the Quick patent in suit and it is not found in any of the art before this Court.

Having demonstrated from the prior art where that art failed, and how Quick by his invention solved the problem of the art which existed from 1888, we submit this Court should follow the direction of the Supreme Court in *Eibel Process Co. v. Minnesota & Ontario Paper Co.,* 261 U.S. 45 at 63:

> " . . . If it has done so, then the court is liberal in its construction of the patent, to secure to the inventor the reward he deserves. . . . "

The Thaw System of Operation

The defense of this action was predicated upon the thesis and theory that the Thaw system acted to completely re-evaporate the liquid refrigerant, and that therefore the Thaw system followed the teaching of the prior art of complete re-evaporation of liquid refrigerant before it reached the compressor. This theory of the defense was completely exploded at the trial through the use of simple arithmetic where it was demonstrated that the liquid refrigerant produced during the operation of the Thaw system was such that if the metering ac-

cumulator of the Thaw was not used, such quantities of liquid refrigerant would be returned to the compressor as would completely disrupt the compressor. This fact was admitted by Mr. Nussbaum after plaintiffs' witness, Mr. Wile, taking the figures supplied by Mr. Nussbaum, established the quantity of liquid refrigerant produced during a defrosting operation if allowed to return to the compressor as slugs would have destroyed the compressor. And in these calculations it was determined that during a defrosting operation the quantity of liquid refrigerant produced would be 54 pounds. It was established and admitted by Mr. Nussbaum that if the metering accumulator in the Thaw system were not present that this quantity of refrigerant would arrive at the compressor in the form of slugs:

> "Q Now, if that wasn't metered into the suction line in small quantities it could come in there in slugs, couldn't it?
>
> A If it did not have a metering accumulator and a holdback valve the refrigerant would be likely to arrive in the form of slugs, yes." (Tr. Vol. 13, page 1558, lines 8-13).

Plaintiffs' witness Mr. Wile established on page 1562 that in the operation of the Thaw system if it was not for the operation of the metering tube the quantity of liquid would be such that 41 pounds of refrigerant reached the compressor in the form of slugs during a 27 minute period of operation and that this quantity of refrigerant as a liquid would pass into the compressor, stating:

> "Q Leaving the difference between 13 and 54 pounds?
>
> A 41 pounds of refrigerant that would reach the compressor during the 27 minutes.

Q And that would reach it in a dispersed form due to the metering tube operation, would it not?

A It would.

Q And if that was an open type compressor it would pass into the compressor — into the compressor, wouldn't it?

A Well, yes."

(Tr. Vol. 13, page 1562, lines 2-11).

Contrary to the belief or thesis upon which this case was tried, that is, of total re-evaporation before the refrigerant could reach the compressor in the Thaw operation, Mr. Nussbaum admitted that the liquid refrigerant would reach the compressor in unevaporated form, stating:

"Q Now, isn't it a fact, Mr. Nussbaum, that this calculation proves that refrigerant would reach the compressor in liquid form?

A If we have only a 20-foot suction line then it would reach the entrance to the motor compressor partially unevaporated, and it would proceed to evaporate as it passes through the suction passages of the compressor and through the motor windings of the compressor.

Q Is the Thaw system only useful with a hermetic type compressor?

A No, it is not."

(Tr. Vol. 13, page 1560, lines 4-14).

The explanation of the last portion of this examination is that Mr. Nussbaum in the latter part of his answer above quoted endeavored to state that in a hermetic type

compressor it is possible that the same liquid refrigerant might be evaporated in the suction passages of the compressor and when passing through the motor windings of the compressor, a system which is not feasible or possible in anything but a hermetic type compressor, and in this respect Mr. Nussbaum was forced to admit that when the Thaw system is used in a system other than where there is a hermetic type compressor the amount of liquid which reached the compressor as dispersed in the gas is as disclosed by Quick in his patent and that it is due to the dispersal of the liquid refrigerant in a gaseous refrigerant which permits the Thaw system under such condition to operate. There is no other conclusion. This portion of this argument is not here presented for the purpose of demonstrating the fact of infringement which was not ruled upon by the District Court although there was presented to the District Court findings of fact which would have no infringement and these findings were rejected by the District Court as is shown by the record here. This factual demonstration of infringement is presented to show that the defendants herein, in predicating their theory of defense upon the theory of total re-evaporation, have in effect admitted the fact that the teaching of all of the art prior to the Quick invention was upon the theory of total re-evaporation of the liquid refrigerant and that the Kramer-Trenton Company before the District Court sought to bring the Thaw operation within the teachings of the prior art, that is, of total re-evaporation and that it was finally shown to the District Court that the Thaw system in fact did not operate upon the theory of the defense, that is, of total re-evaporation.

There was no departure from and no misrepresentation made in the prosecution of the application before the Patent Office (Findings 25 and 27)

This Court did not find nor does the evidence support a finding that there was any misrepresentation made to the Patent Office which was in any way material to, relied upon, or instrumental in obtaining the allowance of the application before the Patent Office. The establishment of such facts is an essential to this defense and as this is a defense in the nature of fraud, it is obvious that the burden is upon the person asserting such fraud to establish the same, and the burden is very heavy in this regard. *Edward Valves, Inc. v. Cameron Iron Works, Inc.,* (C.A. 5, 1961), 286 F.2d 933, 947. This case establishes, among other things:

> ". . . The file wrapper of the Allen patent shows that the withdrawal of the Brown patent played no part in the subsequent allowance of the Allen patent. A false statement does not destroy the presumption of validity of a patent unless the statement was 'essentially material' to its issuance. . . ."

and further establishes the law that:

> ". . . The appellants have a heavy burden in alleging fraud. See Metal Extrusions, Inc., D.C. Fla. 1956, 145 F.Supp. 51 affirmed Porterfield v. Gerstel, 5 Cir., 1957, 249 F.2d 634; Becton Dickinson & Co. v. R. P. Scherer Corp., 6 Cir. 1954, 211 F.2d 835. . . ."

In this case it is clear that from a consideration of this entire matter as presented on behalf of Quick to the Patent Office, Quick sought a solution to a single problem and that problem was the handling of liquid refrigerant as produced during defrosting and which, unless inhibited, would return to the compressor in such manner

as to damage the compressor and stop the refrigeration operation. It is clear throughout the series of three applications that what Quick invented is carried over throughout the three applications. There was no change in the application which was material to the allowance of the claims as ultimately allowed by the Patent Office. The only possible claim that could be made contrary to the foregoing is to assert that Quick did not understand the operation of his invention or did not understand the theory on which it was operating.

The theory of his operation of how his solution to the problem actually performed its operation in solving the problem is not to be considered in any way as a requisite to the validity of the Quick patent. It is immaterial to the consideration of the validity of the patent whether or not the patent contains an erroneous explanation of its principles or manner of operation. *Petroleum Rectifying Co. v. Reward Oil Co.* (C.A. 9, 1919), 260 F. 177, 181; *Aetna Stub Products Corp. v. Southwest Products Co.* (C.A. 9, 1960), 282 F.2d 323, 334; and *Diamond Rubber v. Consolidated Rubber Tire Company,* 220 U.S. 428, *supra.*

In the attack made by Finding 17 upon the presentation of a Hart article to the Patent Office to show that the Hart article taught re-evaporation and to avoid the use of a trap or accumulator in the suction line or that a refrigerant must be re-evaporated therefrom, it is only necessary to read the Hart articles and the specific quotations made therefrom as, for example, here specifically set forth and quoted from these articles under the heading "The Hart Publications of February 1951 and March 1951, Exhibits P and Q", wherein it is shown that Hart teaches in Exhibit Q that no trap should be used in the suction line as such use would be likely to produce a slug which would have to be evaporated, and who also

teaches that where an accumulator or a trap is so used such trap or accumulator would have to retain the refrigerant "until it is 'boiled off' ". These are the facts which are material to the presentation of this matter to the Patent Office on behalf of applicant Quick and is the distinction which was made and it is immaterial whether an error was made with reference to the use of some other adjunct in the system which is not material to the question of re-evaporation or operation of the system when in defrost. There is no showing in any way that this error had any effect whatsoever upon the examination and in fact it could not have had. The real premise of the presentation of this matter to the Patent Office was that the article taught the avoidance of trapping a liquid in the suction line or taught that if such trap or accumulator were used it would have to hold the liquid refrigerant until it was completely "boiled off". Innocent misrepresentations which are not shown to have any effect upon the issuance of the patent do not destroy the presumption of validity, nor do they in any way affect the enforcement of the patent issued.

In addition to the cases herein set forth establishing this fact, see *Martin v. Ford Alexander Corporation,* 160 Fed. Supp. 670, U.S.D.C.S.D.Cal. 1958), and *McCulloch Motors Corporation v. Oregon Saw Chain Corp.,* 147 USPQ, 175, D.C. S.D. Cal. 1965.

CONCLUSION

It is therefore respectfully submitted that the District Court erred in holding that the Quick patent was invalid or that it did not require the use of invention to perceive the Quick method of operation which deviated completely from the teaching of the prior art and brought into operation a system utilizing the very ancient and known universally usable system of hot gas defrost which, as the record shows, was accepted by the art on a very large scale upon its introduction and that the fact that there was invention in this system is further amplified and proved by the fact of literal copying of the Quick invention by Kramer-Trenton Company within the doctrine laid down by this Court in *The Filtex Corporation v. Atiyeh* (C.A. 9, 1954), 216 F.2d 443, 445, and *Troy v. Products Research* (C.A. 9, 1964), 339 F.2d 364, 366.

Respectfully submitted,

LYON & LYON

By

Lewis E. Lyon

Attorneys for Appellants

CERTIFICATE

I certify that in connection with the preparation of this Brief I have examined Rules 18 and 19 of the United States Court of Appeals for the 9th Circuit and in my opinion the foregoing Brief is in full compliance with those rules.

Lewis E. Lyon

APPENDIX

Document	Plaintiffs' Exhibit No.	Marked for Ident. Record Page No.	Received in Evidence Record Page No.
U.S. Patent No. 2,953,906, Lester K. Quick, dated Sept. 27, 1960, for Refrigerant Flow Control Apparatus	1	5	6
File Wrapper of U.S. Patent Application Ser. No. 396,115, Lestor K. Quick, for Accumulator Trap For Refrigerating Systems	2	96	196
File Wrapper of U.S. Patent Application Ser. No. 436,784, Lester K. Quick, for Refrigerating Apparatus	3	96	196
Agreement between Lester K. Quick and H. W. Jarvis, dated May 20, 1955	4	36	43
Agreement between H. W. Jarvis and refrigeration Engineering, Inc. dated Sept. 1, 1955	5	36	41
Supplemental Agreement between Lester K. Quick and H. W. Jarvis, dated Sept. 1955	5A	36	43
Certificate of Amendment of Articles of Incorporation of Refrigeration Engineering, Inc. Change of Name to Recold Corporation	5B	36	40
Article by Israel Kramer, "The 'Thermobank' System"	6A	96	391
Article by Otto J. Nussbaum, Automatic Defrost Utilizing A Latent Heat Source	6B	96	
Article by Otto J. Nussbaum, "The Thermobank Simplified"	6C	96	408
Brochure—"Kramer presents a new kind of Thermobank"	6D	96	908
Sketch showing Defrost Operation	6D-1	927	930
Bulletin — "Installation Instructions for Kramer Thaw System"	6E	96	450

Document	Plaintiffs' Exhibit No.	Marked for Ident. Record Page No.	Received in Evidence Record Page No.
U.S. Patent No. 2,718,764, I. Kramer, dated Sept. 27, 1955, for Refrigerating System With Hot Gas Defrosting Means	6P	96	946
Memos from David A. Nurse, (Kramer-Trenton Company) to Kold Kist, Atten. Mr. Linden, dated 7/12/61 and 6/9/61	7	96	534
Kramer Bulletins	7-A	96	534
Bulletin—List Prices Kramer Thaw System	8	96	534
Bulletin — Kramer Thaw System — "A New Automatic Hot Gas Defrost System"	9	96	450
Photographs of demonstration models	10-A to 10-H	96	468
Kramer Thermobank System, Exhibit A to affidavit of Daniel D. Wile, filed herein Feb. 15, 1962	11	96	468
Article by R. H. Luscombe, "Methods of Defrosting Commercial Refrigerating Equipment" (See Wile Affidavit, Def. Exh. MM, Volume 4, Defendants' Book of Exhibits)	12	233	753
"Recold Hot Gas Installations", graphs, interoffice communications, memoranda, charts, etc.	13	96	484
Photographs of test operations at Recold and submitted to Examiner at Patent Office interview	14-A to 14-E	96	472
Physical Exhibit	15	96	404
Diagrammatic Drawing entitled "A Refrigerant is any volatile Liquid"	16	96	404
Diagrammatic Drawing entitled "Refrigerant Boiling at Low Temperature"	17	96	404

Document	Plaintiffs' Exhibit No.	Marked for Ident. Record Page No.	Received in Evidence Record Page No.
Diagrammatic Drawing entitled "Evaporating and Condensing Temperature of Freon 12 at Various Pressures"	18	96	404
Diagrammatic Drawing entitled "Refrigerant Evaporator"	19	96	404
Diagrammatic Drawing entitled "Steam Condenses When Heat is Removed"	20	96	404
Diagrammatic Drawing entitled "Basic Refrigeration System"	21	96	404
Diagrammatic Drawing entitled "Superheat Defrost System"	23	96	404
Diagrammatic Drawing entitled "Kramer Thaw System"	26	96	450
Physical Exhibit	29	96	404
Supplemental Agreement between H. W. Jarvis and Lester K. Quick, dated Sept. 27, 1960	30		43
Supplemental Agreement between H. W. Jarvis and Lester K. Quick, dated Sept. 27, 1960	30-A		43
Supplemental Agreement between H. W. Jarvis and Recold Corporation, dated Sept. 27, 1960	31		43
Article by W. F. Stoecker entitled "Ammonia Liquid-Return Systems", from Industrial Refrigeration, Dec. 1955	32	96	411
Inter-Office Correspondence between D. D. Wile and H. A. Halls re Kramer "Thaw" Defrost System	33	146	153
Chart—Safeway Store 652, 35201 Newark Blvd., Newark, California, 6/28/62	34	153	153
Chart—Safeway Store 646, 1400 E. Washington Blvd., Petaluma, Calif., June 29, 1962	35	153	153

Document	Plaintiffs' Exhibit No.	Marked for Ident. Record Page No.	Received in Evidence Record Page No.
Observations made at Pt Locations, by Harold Halls July 24-25, 1962..	36	153	154
Letter from D. D. Wile to L. E. Lyon dated Feb. 9, 1955	37	424	424
Photograph, Kramer Thaw System..	38	841	
Sheet from Refrigeration Service & Contracting, March 1963, "the companion to Thermobank . . . Kramer Thaw System	39	897	897
Article by Otto J. Nussbaum, "Automatic Defrost Utilizing a latent heat source"	40	904	904
Photographs, Unimart Burbank Store, 2311 Hollywood Way, 6-3-64, 6-4-64	41	1548	1548

Document	Defendants' Exhibit No.	Marked for Ident. Record Page No.	Received in Evidence Record Page No.
File Wrapper of U.S. Patent No. 2,953,906, dated Sept. 27, 1960, for Refrigerant Flow Control Apparatus	C	96	350
Article by Otto J. Nussbaum entitled "The Thermobank Simplified" from March 1946 Refrigeration Industry	E	96	
Line Diagram for Kramer Thermobank No. 2765-5, Dated 9-7-45	F	96	1083
Drawing No. 5425, Surge Tank	G	96	1083
Drawing No. A-6756, Diagrammatic Line Layout for Special Thermobank System (York Corp.), March 16, 1950	H	96	1083
Drawing No. G-6211, Line Diagram of Thermobank Systems Using Two Evaporators With One Thermobank and Surge Tank, 2-9-49	I	96	1083
Drawing No. 5357, Installation of Extra Surge Tank with Large Thermobank Systems, dated 4-11-47	J	96	1089
Bulletin RI-122, Surge Tank for Large Capacity Thermobank Systems, Print No. 5357	K	96	1089
Letter to Frigidaire Sales Corp. from Otto J. Nussbaum of Kramer-Trenton Company, dated June 18, 1947	L	96	1089
Letter to Acar Supply Company from Otto J. Nussbaum of Kramer-Trenton Company Dated Oct. 7, 1947	M	96	1091
Letter to Gibson Engineering from Otto J. Nussbaum of Kramer-Trenton Company Dated Mar. 25, 1948	N	96	1091

Document	Defendants' Exhibit No.	Marked for Ident. Record Page No.	Received in Evidence Record Page No.
Article by Thomas H. Hart, entitled "Hot Gas Defrosting in Commercial Refrigeration", from Refrigerating Engineering, Feb. 1951 (Part I)	P	96	1148
Part II of Exhibit P	Q	96	1148
Bulletin, "Kramer presents a new kind of Thermobank", Copyright 1956 Kramer-Trenton Co.	S	96	1260
Bulletin 12C5a, "Recold Vapomatic Defrosting"	T	96	1232
Bulletin, "Vapomatic Coils", 12C9a	W	96	1232
Bulletin, "Vapomatic Units" (Patent No. 2,953,906)	X	96	1232
Bulletin, "Installation Instructions for Larkin Low Temperature Humi-Temp Units Equipped with Frost-O-Trol Automatic Hot Gas Defroster"	Y	96	1082
Photograph, accumulator trap mounted over top of cooler, McKays Mkt.	AA	96	302
Drawing, Blower & Compressor, Meat Cooler, McKays Mkt.	BB	233	302
Physical Exhibit (Stereo Slide)	CC	233	283
Drawing, Two Hot Gas Defrosts, New Defroster, George Orr Walk-in Cooler, Eugene Ore.	DD	233	283
Physical Exhibit (Stereo Slide)	EE	233	283
Drawing, Remote McCray Ice Cream Case Accumulator Trap Defrost 30 Min.	FF	233	302
Drawing, Accumulator Trap	HH	233	350
Physical Exhibit (Book of Prior Art)	II	233	1474
Physical Exhibit (Book of Prior Art)	JJ	233	1474

Document	Defendants' Exhibit No.	Marked for Ident. Record Page No.	Received in Evidence Record Page No.
Answers To Defendants' First Interrogatories to Plaintiff, dated December 13, 1961	KK	233	753
Bulletin P480, April 1960, List Prices Kramer Thaw System	LL	307	753
Affidavit of Daniel D. Wile in Response to Motion for Summary Judgment, Feb. 15, 1962	MM	233	753
Plaintiffs' Answers to Defendants' Interrogatories 24 Through 32, Oct. 10, 1962	NN	91	602
Plaintiffs' Response to Request for Admissions Under Rule 36	QQ	307	1474
Plaintiffs' Response to Interrogatories Nos. 33 to 90, Inclusive, March 1, 1963	RR	307	753
Bulletin 16R, Thermobank by Kramer, Copyright, 1949	WW	233	1082
Certified copy of Affidavit of Daniel D. Wile filed Sept. 14, 1959 (Patent No. 2,953,906, Sept. 27, 1960, Lester K. Quick)	XX	620	753
U.S. Patent No. 2,675,683, April 20, 1954, W. L. McGrath et al., Control Means for Refrigeration Systems	YY	620	753
Bulletin 204 featuring Air Cooled Hermetic Condensing Units ⅛ to 3 H.P.	ZZ	620	1260
Article by Paul Reed, "Refrigeration Problems And Their Solution" Reprinted from Air Conditioning & Refrigeration News, May 14, 1956	AB	620	753
Physical Exhibit (Drawing)	AC	693	1375
Physical Exhibit (Drawing)	AD	693	1149
Physical Exhibit (Drawing)	AE	693	1205

Document	Defendants' Exhibit No.	Marked for Ident. Record Page No.	Received in Evidence Record Page No.
Physical Exhibit (Drawing)	AF	693	1375
Physical Exhibit (Drawing)	AG	722	1375
Physical Exhibit (Drawing)	AI		1205
Physical Exhibit (Drawing)	AJ		1205
Physical Exhibit (Drawing)	AK		1381
Physical Exhibit (Drawing)	AL		1383
Physical Exhibit (Drawing)	AM		1149
Physical Exhibit (Drawing)	AN		1168
Physical Exhibit (Drawing)	AO		1177
Physical Exhibit (Drawing)	AP		1382
Physical Exhibit (Drawing)	AQ		1168
Physical Exhibit (Drawing)	AR		
Physical Exhibit (Drawing)	AS		
Physical Exhibit (Drawing)	AT	1116	1149
Notes Dated 6-11-64 — T520L Thaw System T520 Evaporator — T3 accumulator	AU	1527	1527

No. 19833

In The

United States Court of Appeals

FOR THE NINTH CIRCUIT

RECOLD CORPORATION, a corporation and LESTER K. QUICK,

Appellants,

vs.

DAVID A. NURSE, d.b.a. DAVID A. NURSE COMPANY and HUGH ROBINSON & SONS, a corporation,

Appellees.

APPELLEES' BRIEF.

C. A. MIKETTA,
WILLIAM POMS,
GUY PORTER SMITH,

of

MIKETTA, GLENNY, POMS & SMITH,

210 West 7th Street,
Los Angeles, Calif. 90014,

Attorneys for Appellees.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

TOPICAL INDEX

TABLE OF AUTHORITIES CITED

Cases Page

Rules

Statutes

Textbooks

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APPELLEES' BRIEF.

JURISDICTION.

Appellants' statement of jurisdiction is not contested, by appellees, but is considered **incomplete** to satisfy the requirements of the Rules of the United States Court of Appeals for the Ninth Circuit, Rule 18(2b).

This appeal has been brought by plaintiffs from a final judgment of the United States District Court for the Southern District of California holding Quick Patent No. 2,953,906 invalid [R. 274].[1] The issue of infringement is not a part of this appeal.

Plaintiff, Lester K. Quick, is the patentee and legal owner of the Quick patent while plaintiff, Recold Corporation, is an exclusive licensee thereunder [Undisputed Find. of Fact. 3, R. 265].

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[1]The Letters Patent in suit, No. 2,953,906, will be hereinafter referred to as Quick Patent.

Plaintiff, Recold Corporation, brought this action for patent infringement against Kramer Trenton Company, a New Jersey corporation, Trenton, New Jersey, and Robert B. Holland Company, Inc. (in addition to the present defendants) alleging that the THAW refrigeration system [Ex. 9] made by Kramer Trenton Company was an infringement of the Quick patent '906. The complaint was dismissed as to Kramer Trenton and the Holland Company upon motion brought before trial [R. 35-36]. The remaining defendants, David A. Nurse, d.b.a. David A. Nurse Company (residing in Los Angeles, California) and Hugh Robinson & Sons (a California corporation, Los Angeles, California) answered the complaint denying validity and infringement and counterclaimed for a declaration of patent invalidity and non-infringement [R. 6, 154] to which plaintiff Recold replied [R. 16]. The defense of the action was assumed and controlled by Kramer Trenton Company and during trial, Lester K. Quick, owner of legal title of the patent in suit, was made a party-plaintiff together with Recold Corporation, the exclusive licensee [Undisputed Finds. of Fact 2, 4-5, R. 266].

The District Court granted a final judgment and decree holding the Quick patent, and each of the claims thereof, invalid and awarded defendants their costs [Judgment III, IV, R. 275]. The District Court's jurisdiction arose under the patent laws of the United States, Title 35, U.S.C. §281 and under the provisions of Title 28, U.S.C. §§1338(a), 1400(b) and 2201. This Court of Appeals has jurisdiction under the provisions of Title 28, U.S.C. §1291.

STATEMENT OF THE CASE.

Plaintiffs' (appellants)[2] statement of the case and the subject matter is filled with misrepresentations and **it does not correctly inform this Court.** Instead of arguing about each misrepresentation, defendants believe this Court's time will be conserved by stating the case as it is established by the evidence which supports the Findings and Conclusions of the Trial Court.

A careful reading and consideration of plaintiffs' brief leads to the following conclusions:

1. Plaintiffs do not state what the purported invention of the Quick patent is supposed to be; their inability to define the invention confirms the Trial Court's judgment of invalidity.

2. Although certain findings are listed on page 8 of plaintiffs' brief, plaintiffs fail to conform to Rule 18 of this Court and **do not specify with particularity wherein the findings are clearly in error.** It appears that plaintiffs are simply dissatisfied with the conclusions reached by the Trial Court from the findings, but not with the facts found.

3. Plaintiffs attempt to create the impression that hot gas defrosting was not used before the Quick patent, whereas the evidence is to the contrary. Kramer Trenton was making and selling hot gas defrost systems at least five years before Quick and before Recold.

4. Plaintiffs fail to identify a single new or unobvious result obtained by Quick and ignore the

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[2]Appellants will hereinafter be referred to as plaintiffs, Recold and Quick; appellees will hereinafter be referred to as defendants.

admonition of the Supreme Court that the patent must be unobvious pursuant to the requirements of 35 U.S.C. §103.

5. Plaintiffs misrepresent the facts and evidence which compelled the Trial Court to correctly find that the Nussbaum patent 2,564,310, Kettering 1,978,463, and British patent 554,807 were not considered by the Patent Office.

6. Plaintiffs are forced to rely on sophistry and specious argument in attempting to overcome the established fact that the patented assembly was an invalid, obvious, old combination of elements.

7. The fact that the claims of the Quick patent have no basis in the disclosure or specification is carefully concealed in evasive and fallacious argument.

Defendants intend to clearly and concisely inform this Court as to the truth of the facts and controlling law which compelled the conclusion that the Quick patent in suit was invalid. References to evidence, exhibits and testimony will convincingly show that the findings are irrefutably sustained by the evidence. In addition, we are compelled to call your Honors' attention to at least some of the many misstatements, misrepresentations and instances of overreaching which have characterized plaintiffs' conduct prior to and during trial, and now before this Court.

It is believed that your Honors' consideration of this matter would be facilitated by a brief chronological statement of developments in the field of refrigeration and hot gas defrosting, so that the relationship between the prior art and the Quick patent is in proper perspective.

CHRONOLOGY AS ESTABLISHED BY THE EVIDENCE.

1888 - Earliest disclosure relating to the use of hot gas in defrosting a refrigerator [Ex. 40, p. 1].

1926 - Marshall patent 1,594,422 [Ex. II, not cited by the Patent Office against Quick] discloses the usual **old combination** of compressor, cooling coils or condensors, evaporators or refrigeration coil, piping and a trap and a choke diaphragm in which the vapor is compelled to pass through an orifice very much smaller than the pipe 3 so that any slugs of liquid passing through will be held up and only so much allowed to pass as the compressor can take care of (Col. 1, lines 49 *et seq.*).

1934 - Kettering patent 1,978,463 [Ex. II, not cited by the Patent Office against Quick], described the use of a trap or accumulator identical to Quick's in a refrigeration system for use in preventing "slugging" of the compressor by liquid refrigerant due to defrosting [Finds. of Fact 10-12, R. 267-268].

1941 - British patent 554,807 [Ex. II, not cited by the Patent Office against Quick] shows a liquid accumulator 25 with an outlet tube 40, having orifice 42, to supply liquid refrigerant into the suction line to the compressor [Find. of Fact 13, R. 268].

1944 - Hot gas defrosting systems ("Thermobank") installed and sold by Kramer Trenton. Patent 2,440,146 [Exs. II, WW. 6-A, 6-B; Find. of Fact 18, R. 270].

1945 - "Thermobank" hot gas defrost systems in **commercial** use by Kramer Trenton [Ex. 6-A].

1946 - Article by Nussbaum "The 'Thermobank' Simplified" [Ex. 6-C].

1947 - Kramer Trenton's **surge tanks** in commercial public use [Exs. G, J, K, L and M; Find. of Fact 18, R. 270].

Nussbaum patent 2,564,310 (filed June, 1947, not cited by the Patent Office). Figure 4 shows the same elements including a liquid accumulator 35 in the return line as 60 in Quick [Finds. of Fact 20, 21, R. 270-271].

1951 - Hart article, Exhibits P & Q. This described hot gas defrosting systems with liquid accumulator traps in the suction line to the compressor. [See Finds. 14, 15, 16 and 17, R. 269 and Ex. AT].

1952-1953 - Quick was installing "Thermobank" accumulator (made by Kramer Trenton) in hot gas defrosting systems in Oregon [Find. of Fact 7, R. 266].

Nov. 19, 1953 - **First sale** of the apparatus of Quick patent in suit at Emery's IGA store, Salem, Oregon [See Pltf. Answer to Interrog. 12a, Ex. KK].

"The Emery trap and system operated and functioned in the same manner as that of the patent in suit." [Find. of Fact 7, R. 267].

Jan., Feb., 1954 - Quick makes several commercial installations embodying the apparatus of the patent in suit in Orr's Market at Eugene, Oregon and at McKay's Market [Answer to Interrog. 12c, Ex. KK].[3]

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[3]Admitted prior public use as an "expedient", see this Brief pp. 46 to 51.

May 9, 1955 - Quick files the application for patent in suit [Ex. C] more than one year after the installations and sales at Emery's store, Orr's Market and McKay's Market. "All of the elements of the trap are old and were well-known in the prior art before Quick made his first commercial installation in 1953 and before he filed his first application for patent." [Find. of Fact 9].

Nov. 19, 1955 - All claims of Quick application Serial 506,784, defendants' Exhibit C are rejected.

June, 1956 - Supplemental amendment filed referring to interview with the Examiner, attended by D.D. Wile, engineer for plaintiffs.

Jan., 1957 - Claims of Quick application again rejected by the Patent Office.

April, 1959 - After several rejections and amendments, Patent Office finally rejects the claims and clearly shows that all of the elements are shown in the prior art [See Ex. C, pp. 46-47].

Sept. 21, 1959 - Final rejection affirmed by Patent office.

Feb., April, 1960 - Additional final amendments to the claims (after interviews with the Examiner not attended by Mr. Wile) adding "without substantial evaporation" [Ex. C, pp. 82-93].

May, 1960 - Quick application allowed: patent in suit issued September, 1960.

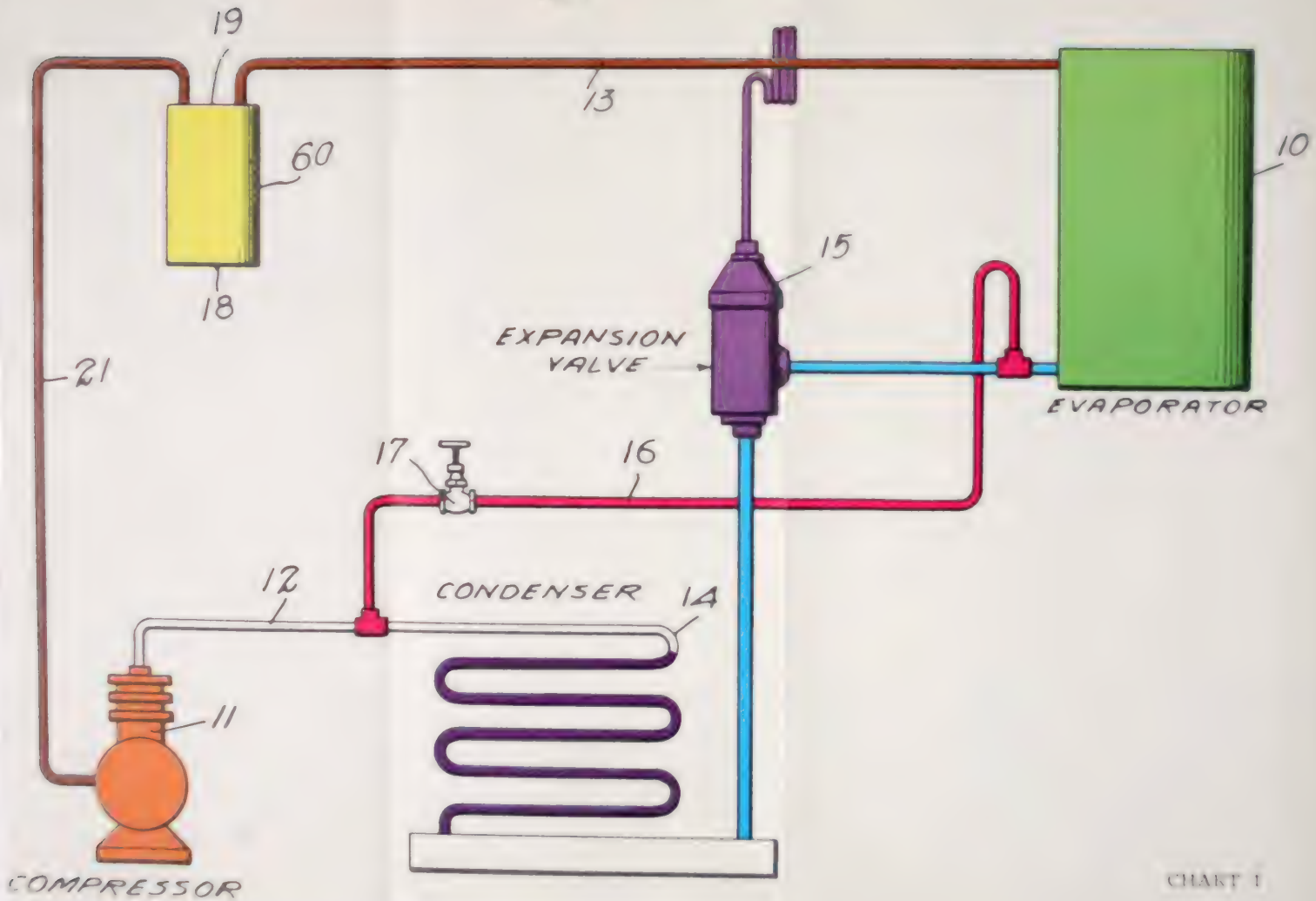
19
13
60
10
18
15
EXPANSION
VALVE
21
EVAPORATOR
17
16
12
CONDENSER
14
11
COMPRESSOR

CHART 1

THE SUBJECT MATTER.

Quick patent '906 relates to the well-known refrigeration system wherein a refrigerant gas (Freon) is compressed in a compressor, sent to a condenser to be liquefied and then passed through an expansion valve and into cooling coils of a refrigerator. When the liquid refrigerant expands into a gas, it absorbs heat (cools the refrigerator). The gas is then sent back to the compressor for re-use.

Your Honors know that the cooling coils of a refrigerator become covered with frost and the efficiency of the system is lowered. It is, therefore, desirable to periodically remove the frost. This was done long before Quick by periodically sending hot compressed gas from the compressor directly into the cooling evaporator coils of a refrigerator, thereby heating them and causing the frost to melt. Some of the gas remained in the gaseous state, but some would give up enough heat (in melting the frost) to be liquefied. The gas (and perhaps some liquid) was again returned to the compressor.

Figure 1 of the Quick patent [Exs. 1 and AP] is attached hereto as chart I with the various elements color coded for ease of presentation. The compressor 11 (orange) compresses the Freon and forces it through line 12 to the condenser 14 (violet). The cooled and liquefied gaseous refrigerant is collected in the receiver located below the condenser 14. This liquid refrigerant then passes from the receiver through liquid line (blue) to the expansion valve 15 (purple) where the pressure and temperature of the liquid refrigerant is lowered due to expansion through the valve. The expanded low

temperature refrigerant then passes into the evaporator 10 (green) within the refrigerated space to cool the refrigerator and pick up heat from the goods or products stored therein. By picking up heat, the refrigerant is converted into a gas or vapor which is then returned through suction line 13, 21 (brown) back to the compressor to be again compressed.

When it is desired to remove the frost from the refrigeration or evaporator coils, the hot gas from the compressor is sent by line 16 (red) directly into the inlet of the evaporator 10 where it gives off its heat to melt the frost covering the coils.

During the defrosting, some of the refrigerant moving from the evaporator or coils thereof toward the compressor is in gaseous form with some of it in the liquid state. In order to prevent large "slugs" of liquid from going into the compressor, Quick followed the previously recommended practice of inserting an accumulator or liquid trap 60 (yellow) in this suction line 13, 21. The trap 60 separates the gas from the liquid refrigerant, the gas passing directly into the suction line 21 while the liquid is fed slowly into the suction line at such a rate that the liquid has no perceptible effect on the compressor, or is converted into gas in the suction line if the air around the trap and suction line is warm enough.

Each and every piece of equipment and piping shown by Quick, in the same relationship, operating in the same manner for the same purposes was clearly shown in the prior art. The evidential facts which compelled the Trial Court to make its findings and hold the Quick patent invalid are discussed in detail hereinafter. However, your Honors may be interested

at this time to glance at the prior Nussbaum *et al.* patent 2,564,310 [Exs. II, AD] whose patent drawing, Figure 4, is reproduced herein as chart II. This drawing is code colored with the same colors used in the Quick drawing, chart I, and a comparison of the two charts shows the identity of the systems. It is to be noted that in chart II (Nussbaum '310) 35 represents an accumulator or liquid trap in the same position and for the same purpose as the liquid trap 60 employed by Quick.

The article by Thomas H. Hart published in "Refrigerating Engineering", February and March, 1951 [Exs. P, Q and AT] also shows a simplified diagram of the equipment on page 140 of the article, and recommends the use of an accumulator or trap in the suction line leading to the compressor in order to stop slugs of liquid (p. 247 and Chart III herein).

KRAMER TRENTON HOT GAS DEFROST SYSTEMS PRECEDED QUICK.

Testimony and exhibits relating to prior knowledge established that Kramer Trenton made and sold "Thermobank" systems with and without accumulator traps (known as surge tanks) more than five years before Quick sold and installed his Emery installation. [Undisputed Find. of Fact 18, R. 270; Exs. F, G, H, I, J, K, L, M and N; Nussbaum, Tr. 1059-1091. **These surge tanks produce the same results in the same location of the system as the Quick traps and the Recold Vapots** [Undisputed Find. of Fact 18, R. 270]. The "Thermobank" system is essentially a liquid trap or accumulator inserted into the refrigeration system suction line to arrest slugs of liquid which would otherwise be returned to the compressor, the liquid refrigerant trap

or accumulator being surrounded by a heat-hold jacket [Nussbaum, Tr. 889, 1051-1055, Ex. WW]. The surge tank [Exs. F and G] did not have such a heat-hold jacket. Other hot gas defrosting systems in which the accumulator or liquid trap does not have a surrounding heat jacket were also successfully employed [Hart articles, Exs. P and Q; Nussbaum, Tr. 1162].

The wide use and success of the Kramer "Thermobank" hot gas defrosting system is shown in part by the fact that the patentee Quick was installing a Kramer "Thermobank" hot gas defrosting system "on every low temperature system in every market we install" prior to 1953, including at least fifty to seventy-five and "probably more" installations [Quick, Tr. 199].

The **metering accumulator** used in the Kramer Trenton THAW system [Ex. 9] involved in this action, is a horizontal version of a **surge tank** and has the same operation, the same function and produces the same results as the surge tanks made and sold by Kramer Trenton during 1947-1955 [Find. of Fact 19, R. 270; Nussbaum, Tr. 1093, 1102-1103].

Plaintiffs erroneously represent to this Court that the water defrost system prevailed in the refrigeration industry to the time in 1954 when Recold adopted the Quick trap system of the patent in suit (App. Op. Br. pp. 2-4). Actually, the Recold water defrost method was not competitive with the Kramer Trenton "Thermobank" hot gas defrosting system and Recold was forced into adopting a hot gas defrosting system in an attempt to compete with the overwhelmingly successful and widely used "Thermobank" system [Pltf. witnesses, Jarvis, Tr. 48-50, 79-80; Wile, Tr. 417-418].

Defendants should not be deprived of employing their own inventions and developments nor from utilizing knowledge that is in the prior art. Skilled mechanics have the right to use all prior knowledge: the Quick patent cannot be sustained because its "* * * effect is to subtract from former resources freely available to skilled artisans." (*A & P Tea Co. v. Supermarket Corp.*, 340 U.S. 147.)

THE CLAIMS OF THE QUICK PATENT ARE INVALID FOR CLAIMING AN OLD COMBINATION.

Prior art patent to Nussbaum '310 [Exs. II, AD], discloses a hot gas defrosting system having the same combination of elements in the same relationship as the elements disclosed in the Quick patent in suit. This Nussbaum patent was filed in 1947 and is owned by Kramer Trenton Company who were making and selling hot gas defrost systems long before plaintiffs Quick and Recold. This prior art patent was not cited by the Patent Office against Quick.

Figure 4 of the Nussbaum patent is reproduced herein as chart II and code colored so that your Honors can readily compare it with the drawing of Quick's patent similarly colored and shown on chart I. Note the identity of the elements and functions; during refrigeration gas compressed by the compressor (orange) flows to the condenser (violet) and receiver 5, then by line 6 (blue) to expansion valve 7 and evaporator or refrigeration coils 9 (green), and then by suction line 13 (brown) back to the compressor.

During defrosting, hot gas from the compressor is sent by by-pass line 31 (red) directly to the evaporator, and the accumulator trap 35 (yellow), in the suction

line to the compressor, holds back liquid refrigerant to prevent slugging of the compressor just as in Quick. The correctness of Findings 20 and 21 cannot be questioned. Plaintiffs admit:

> "It (Nussbaum '310) does deal with a hot gas defrost operation as it indicates in the modification of Figs. 4 and 5 a bypass line 31 for bypassing hot gas from the compressor to bypass the condenser 3, receiver 5, and expansion valve 7 for the purpose of defrosting the evaporator 9. It * * * shows in the suction line a container or accumulator 35 having a bottom inlet and top outlet which would thereby form a trap to hold liquid refrigerant from flowing to the compressor 1 during the defrosting operation." (Pltf. Op. Br. p. 42).

The above admission [and Finds. of Fact 20 and 21] are compelled by the uncontradicted testimony and exhibits including [Nussbaum, Tr. 1130-1132 and 1137-1146; Gabriel, Tr. 1375-1380, 1362-1369 and 1385-1386]. **Plaintiffs thus admit and cannot contest** the Trial Court's Findings of Fact 20 and 21, the latter stating:

> "The Nussbaum patent '310 shows that the combination of elements in the system disclosed and claimed in the Quick patent in suit was old and well-known more than five years prior to Quick's use of traps and hot gas defrost systems in 1953." [Find. of Fact 21, R. 271].

The Court is thus compelled to hold the Quick patent invalid since old elements in an old combination are not patentable.

> "The mere aggregation of a number of old parts or elements which, in the aggregation, perform or

produce no new or different function or operation than that theretofore performed or produced by them, is not patentable invention."

Lincoln Engineering Co. v. Stewart Warner Corp., 303 U.S. 545 at 549.

"Courts should scrutinize combination patent claims with a care proportioned to the difficulty and improbability of finding invention in an assembly of old elements. * * * Patents cannot be sustained when, on the contrary, their effect is to subtract from former resources freely available to skilled artisans. A patent for a combination which only unites old elements with no change in their respective functions, such as is presented here, obviously withdraws what already is known into the field of its monopoly and diminishes the resources available to skillful men."

A & P Tea Co. v. Supermarket Corp., 340 U.S. 147.

The above rules have been reiterated by the Supreme Court in the recent *Graham v. John Deere Company, Cal-Mar v. Cook Chemical* and *Colgate-Palmolive Company v. Cook Chemical* cases reported at 86 S. Ct. 686, particularly at 694.

Plaintiffs concede that the prior Nussbaum '310 provides a trap or liquid accumulator 35 in the suction line for the same purpose and function as the Quick accumulator trap 60, *i.e.,* to hold or trap liquid refrigerant and prevent it from flowing as a "slug" to the compressor during the defrosting operation. The functions of the Quick accumulator trap and the Nussbaum accumulator trap are identical; these traps are for the

same purpose in the same combination of old refrigeration equipment elements [Gabriel, Tr. 1374-1377, 1390, 1399-1404; Nussbaum, Tr. 1126-1138, 1141, 1181, 1185 and 1224; Find. of Fact 20]. No new, unobvious or surprising result is obtained by Quick from this old combination.

Plaintiffs only criticism of the Nussbaum prior patent '310 [Ex. AD] is that Nussbaum's trap 35 is not of the same construction or form as the Quick trap 60 (Pltf. Op. Br. pp. 42-44). **The function or purpose is admittedly the same for both traps**; both trap slugs of liquid to prevent "slugging" of the compressor during defrosting. Trap 35 of Fig. 4 of Nussbaum is only **exemplary,** since Nussbaum specifically states that "* * * various changes may be resorted to in the form, construction and arrangement of the several parts * * *" (Col. 9, lines 44-46).

A change in form or construction of a trap or accumulator is not patentable invention. Substitution of one form of trap for another form which does substantially the same thing for the same purpose in the same environment of old elements is not invention. The obviousness of such changes or substitutions was established by uncontradicted testimony of Nussbaum and Gabriel, and was obvious to the Trial Court [Find. of Fact 20; Exs. AD, II; Nussbaum, Tr. 1137-1146; Exs. AM, AN, AT; Tr. 1186-1194, Exs. AI and AS; Gabriel, Tr. 1362-1369, 1385-1386; Exs. AF, AG, AI, AJ, AK and AL]. Such substitutions and changes in form are unpatentable changes in degree, as stated by this Court:

> "* * *, the advance is one in degree rather than in kind. And that plainly is not enough to constitute a patentable advance. For *Lincoln Engineering Co.*

v. Stewart Warner Corp., 303 U.S. 545, 549-550 (1938) teaches us that '. . . the improvement of one part of an old combination gives no right to claim that improvement in combination with other old parts which perform no new function in the combination.' Since the advance claimed here concededly performs no different function, but merely improves on the pre-existing Lathrop patent, its status providing patent protection must be stripped away."

The Troy Co. v. Products Research Company, 9th Cir., 1964, 339 F. 2d 364.

In the light of Nussbaum, any man skilled in the refrigeration art, or even a refrigeration mechanic, can make a trap or accumulator or substitute an older trap for the one described by Nussbaum without exercising invention. He could, for example, use the trap described by Kettering for use in a refrigeration system in expired patent 1,978,463 [Ex. II] since its applicability is immediately apparent. The Kettering trap of Fig. 1 [Ex. AE] is identical to the trap 35 illustrated in Nussbaum '310. The Kettering Figs. 1 and 2 traps are obvious equivalents. In the Kettering trap:

"* * * this liquid refrigerant is delayed in the trap 15 and is fed slowly and **at such a rate that the liquid has no perceptible effect on the compressor.**" [Ex. II, p. 1, lines 92-96].

This Kettering patent (not cited by the Patent Office against Quick) is discussed in detail hereafter.

If plaintiffs contend that Quick purportedly invented an improved trap construction, the Quick patent is invalid because it attempts to cover the old combination of old parts and pieces of equipment and their old operations as well as the trap and thereby violates the rule of *Lincoln Engineering v. Stewart Warner Corp., supra.*

If plaintiffs contend that their purported invention lies in "feeding the liquid back into the gaseous refrigerant at a controlled rate" so as to prevent "slugging", then the Quick patent is invalid since that group of words or description is not a statement of a mechanical construction, but only a restatement of the function or operation of the old Kettering trap which is in the public domain and cannot be patented again, either alone or in combination with other old elements.

> "* * * Patentees are not entitled to a monopoly for the judicious use of materials the use of which would produce the result to be expected from such selection. Recognition is not invention. Continental Fibre Company v. Formica Insulation Company, 287 F. 455; Vitamin Technologists, Inc., a Corporation v. Wisconsin Alumni Research Foundation, 9 Cir., 136 F. (2d) 318; Aero Neck-Band & Collar Company v. Beaver Mfg. Co., 97 F. (2d) 363, 365."
>
> *Kalich v. Paterson Pacific Parchment Co.,* 137 F. 2d 649 (C. A. 9).

The facts and the law sustain the Trial Court's findings and Judgment of invalidity.

THE TRAP OF THE KETTERING PATENT IS IDENTICAL IN FUNCTION AND OPERATION TO QUICK'S TRAP.

Plaintiffs' representation is false and contrary to the facts and evidence when they state that Quick was the first to devise a method which did not completely re-evaporate liquid refrigerant before it was returned to the compressor (Pltf. Op. Br. p. 6).

The claims of the Quick patent call for return of the refrigerant "without substantial evaporation" (see Col. 4, line 4; Col. 5, line 14; Col. 6, line 9 and lines 28-29).

In the specification of the Quick patent, it is stated that most of the refrigerant will be re-evaporated and returned to the compressor in gaseous form (Col. 4, lines 2-4). Quick also states that:

> "* * * any portion not evaporated, along with any oil, is in such small amounts as to have no tendency whatsoever to damage the compressor." (Col. 3, lines 45-48).

We must remember that liquid refrigerant always includes some liquid oil originating at the compressor by leakage past the pistons, and this oil is returned to the compressor.

From the Quick patent specification it appears that it does not make much difference whether all or a part of the liquid refrigerant is evaporated before it reaches the compressor as long as large slugs are not returned.

How does this differ from the prior art? **There is no difference.**

The Hart article, Exhibits P and Q, published early in 1951 discusses hot gas defrosting and recognizes that the return of slugs of refrigerant to the compressor would result in noisy operation, particularly when high speed compressors are used. So Hart states

> "**The remedy in this case is an accumulator in the suction line** arranged to stop the slugs of liquid, allow them to re-evaporate, and at the same time provide for the return of oil to the compressor." [Ex. Q, p. 247].

That is exactly what Quick did. He simply followed the recommendations of the prior art. And a satisfactory accumulator trap is clearly shown in the expired Kettering patent.

Kettering describes a trap in the suction line to a compressor of a refrigeration system. He recognized that when a large quantity of liquid refrigerant entered a compressor, it would operate noisily and could even be damaged. Therefore this Kettering patent states

> "It is among the objects of this invention to provide means for preventing or delaying this flow of liquid refrigerant into the compressor while permitting a substantially uninterrupted flow of gaseous refrigerant to the compressor." (p. 1, lines 11-16).

The Kettering trap [Ex. II, Fig. 2] was cylindrical, tubular, vertical and resembled the Quick trap. Here is his description of the essential elements of the trap and its operation in preventing slugging:

> "However, according to my invention, this liquid refrigerant is delayed in the trap 15 and is fed very slowly and at such a rate that the liquid has

no perceptible effect on the compressor." (p. 1, lines 92-96).

"It is provided with a substantially unrestricted gaseous refrigerant passage or intake 36 and with a **restricted liquid refrigerant drain** 37 below the gaseous refrigerant intake 36." (p. 1, lines 102-106).

"A slight amount of **liquid** refrigerant is allowed to pass through the drain 37 and is picked up by the gaseous refrigerant and **is carried to the compressor 10."** (p. 1, lines 115-118).

The Kettering trap therefore provides means for accomplishing every function of the Quick patent. It is located in the same suction line leading to a compressor; it stops slugs, it permits gaseous refrigerant to pass through quickly and directly, and it feeds or meters the liquid slowly. The slight amount of liquid refrigerant allowed to pass is "picked up" by the gaseous refrigerant. Kettering mentions the fact that the size of the drain is such that the amount of liquid refrigerant passing through the pipe is insufficient to harm the compressor.

Here is a complete teaching that answers all of the requirements of the accumulator traps referred to by the Hart article. Although the anticipatory effect of Hart, the Nussbaum patent and Kettering should be obvious to anyone, both Nussbaum and Gabriel testified at length concerning the identity of the systems with the system disclosed by Quick and the identity of the operations and functions performed by these prior art publications and patents. See for example, Nussbaum's testimony Tr. 1179-1199 and 1229-1230 and Gabriel's testimony Tr. 1383-1390 and 1398-1400 and 1404. **The Kettering**

trap is of substantially the same construction as the trap used by Quick in the Emery 1953 installation and operates in the same manner to produce the same result as the trap or accumulator of the Quick patent in suit [Find. of Fact 12, R. 268].

The Trial Court's Findings of Fact 10, 11, 12, 14, 20, 23, 24 and 26 were inescapable in view of the evidence.

IT WAS OBVIOUS TO QUICK TO UTILIZE PRIOR KNOWLEDGE.

Quick had been installing refrigeration equipment as a partner in Quick & Olsen of Salem, Oregon for about six years [Tr. 197, 198] and had made many installations of the Kramer Trenton hot gas defrosting system by 1953; "I would say 50 to 75 at least, probably more" [Tr. 199]. He was therefore familiar with hot gas defrosting and the surge tanks and accumulator traps used by Kramer Trenton.

In the fall of 1953, he sold and installed a standard Larkin system [Ex. Y] at Emery's IGA store in Salem, Oregon [Tr. 200]. The standard original equipment so installed was the same old combination;

> "Q. So as original equipment—let's try to get this clear now—you had the compressor, receiver, condenser, the evaporator, and you had a hot gas defrost line running from the compressor to the evaporator; is that right?
>
> "A. That is correct" [Tr. 249].

After the system was installed and started operation, Quick observed that the compressor was vibrating, so

he quickly built and within five days installed a trap in the suction line.

> "* * * As I remember I just took a large piece of pipe which probably was three inches in diameter or four inches in diameter and maybe six or eight inches long, put two caps on it, put a pipe into the top that extended just barely into the top, put a pipe in the bottom that extended almost to the top, and drilled a small hole in the side of the bottom pipe so that no accumulation of oil would occur in this accumulator.
>
> "Q. What operation was performed by that accumulator?
>
> "A. It separated out the liquid that was coming back from the coil being defrosted, and allowed it to slowly re-enter the suction line through the hole that I had drilled in the outlet pipe and thereby returning it slowly to the system, and corrected the problem so that I had no more problem with the compressor." [Tr. 202].

Quick apparently did not want to spend money for a "Thermobank" so he built his own trap and was proud that:

> "A. I sold a working system.
>
> "Q. Did you charge them anything extra for the trap? A. No.
>
> Q. In your mind, was the trap part of the original purchase price? A. No. It was something extra that I gave them over and above what I had bargained to give them. And I could have left the system working and it probably would have held together, but it wouldn't have been right and I knew it wouldn't be right." [Tr. 252-253].

Quick is to be commended for his desire to sell a good job, which was "working fine" two or three years later [Tr. 268] **but plaintiff Recold is not to be permitted to attempt to monopolize** (under the guise of a patent) **the mechanical skill of a refrigeration mechanic** who simply used what was clearly taught by the prior art. Please note that Quick did not have to do any experimentation; as soon as he saw the compressor vibrating, he knew that he needed a trap in the suction line so as to feed this liquid "slowly and at such a rate that the liquid has no perceptible effect on the compressor" (as stated in the expired Kettering patent) or place the trap and suction line in proximity to sufficient warm air so that the slugs of liquid would vaporize before they reached the compressor. These alternatives were clearly taught by the prior art and in the "Thermobank" system which had been in use for many years.

But the exercise of judgment, a change in form without a change in substance, a change in degree or size,

> "* * * if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains." is not patentable (35 U.S.C. §103).

It is only normal to make minor structural changes in size of a device in order to make it conform to the size of the compressor and coils being used in the system; variations in form, minor changes in degree are not inventive whether they are applied to a device described in the patent in suit or to a prior art device.

The circumstances of this initial commercial installation clearly show the obviousness of the subject matter of the Quick patent.

It is to be remembered that there is no difference between the trap sold and installed by Quick in 1953 and the devices being manufactured and sold by plaintiff Recold under the Quick patent.

> "Q. Well, there wasn't any difference between the trap that you installed in 1953 and '54 and this vapot in the vapomatic that Recold is installing is there? A. Nothing other than incidental structural shape changes, etc." [Quick, Tr. p. 299].

The present case is a glaring example of an instance where a large corporation (plaintiff Recold), peddling a water defrost system which is losing ground to a hot defrost system sold by another (Kramer Trenton), makes an agreement with a mechanic (Quick), hires shrewd lawyers to obtain a patent from a Patent Office that does not cite pertinent art, and then attempts to enforce an invalid patent upon the public and to eliminate a competitor. Public policy requires that under such circumstances, and in accordance with the statutory requirements governing patentability, the Courts hold the patent invalid.

> "There is evidence that some patent owners assert their patents not to vindicate their rights, but to harass competitors by burdensome patent infringement litigation or by the threat of such litigation. Courts and critics of the patent system have perceived this abuse. It is recognized that in many instances patents serve not to reward an inventor or his assignee for a single contribution to technology, but as an instrument of unfair competition."
>
> Ladd, *The University of Chicago Law Review,* Spring, 1959, Vol. 26, No. 3, pp. 353-354.

INVALIDITY AS A MATTER OF LAW IS COMPELLED BY IRREFUTABLE FINDINGS OF FACT.

After thirteen days of trial, plaintiffs were compelled to admit that a refrigeration system including a compressor, a condenser, an evaporator or refrigerating coil, a return line to the compressor and a separate line for sending hot compressed gas from the compressor to the evaporator or refrigeration coil for defrosting, were old, well-known, and well-described in the literature and often used in refrigeration systems. Even Quick, a refrigeration mechanic working in the small town of Eugene, Oregon, "had prior experience in installing commercial hot gas defrost systems" employing all these elements [Find. of Fact 7; Quick, Tr. 199]. The use of "hot gas" from the compressor to defrost the evaporator or refrigeration coil was well-known, even to Quick.

It was also known that a compressor should not have large slugs of liquid fed into it, although it could handle small quantities of liquid.

Quick, as a handy refrigeration mechanic, **thought he made a new trap** or accumulator which prevented large slugs of liquid to pass into the compressor. [Please note that the first abandoned Quick patent application was entitled "Accumulator Trap for Refrigerating Systems"; Plaintiffs' Exhibit 2]. It is significant to note that Quick did not claim to have invented a hot gas defrost system.

What Quick did not know, but which was clearly proven during trial, is that it was well-known that a trap or accumulator would restrain large slugs of liquid

and when this was done, the compressor operated very easily.

> "However, according to my invention, this liquid refrigerant is delayed in the trap 15 and is fed slowly and at such a rate that the liquid has no perceptible effect on the compressor." [Ex. II, expired Kettering patent 1,978,463 of 1934, p. 1, lines 92-96].

Therefore, the Trial Court correctly found:

> "9. All of the elements of the Quick trap are old and were well-known in the prior art before Quick made his first commercial installation in 1953 and before he filed his first application for patent. The prior art taught it was old to have means, such as a trap, in the suction line to separate liquid and gaseous refrigerant and have the liquid refrigerant metered back into the suction line in restricted and small amounts so as not to cause damage to the compressor." [Also see Finds. 10 and 11].

Workers in the art knew that you could (1) evaporate all liquid refrigerant before you sent it back to the compressor, or, (2) put in a trap to hold back or delay the flow of liquid and feel it in "* * * slowly and at such a rate that it has no perceptible effect on the compressor."

The Quick patent does not contribute an iota of information over and above what was already known. The Quick patent was issued by inadvertence because:

> "The Patent Office did not consider this Kettering patent during the prosecution of the patent in suit." [Find. of Fact 12].

Perhaps Quick, a refrigeration mechanic working in a small town, did not know of the Kettering Patent and had not read the various publications and patents introduced in evidence during trial, but the fact remains that this prior knowledge was available to those skilled in the art.

> "It is also irrelevant that no one apparently chose to avail themselves of knowledge stored in the Patent Office and readily available by the simple expedient of conducting a patent search * * * a prudent and nowadays common preliminary to well-organized research."
>
> *Graham v. John Deere Co. of Kansas City,* 383 U.S. 1, ... S.Ct. 684, 703 (1966).

Therefore, there was no actual invention made by Quick. However, he had an enterprising patent attorney and obtained a patent through the use of ambiguous, indefinite language, sophistry, and circumlocution. The application filed on behalf of Quick in May, 1955, which became the patent in suit, is a weasel-worded masterpiece of contradictions. For example, in Col. 4, of the patent, in lines 2-6, the patent states that the liquid refrigerant is to be "* * * re-evaporated and returned to the compressor in gaseous form".

But in lines 47 to 51 of the same column of the patent, the above statement is contradicted and now states that the liquid is returned **"without substantial re-evaporation" for re-compressing "said stream of gas and liquid" in the compressor.**

Attention is called to these contradictions since they exemplify the over-reaching and sharp tactics employed by plaintiffs in deliberately clouding the issues.

Fortunately, the Trial Court was not misled by semantics. There is no patentable difference between the undefined "pre-determined rate" of return of gaseous and liquid refrigerant (as stated in the Quick patent) and what Kettering described in his expired patent as the return of the refrigerant "slowly and at such a rate that it has no perceptible effect on the compressor". The Trial Court correctly found:

> "12. The Kettering trap disclosed in patent No. 1,978,463 is of substantially the same construction as the trap used by Quick in the Emery 1953 installation and operates in the same manner to produce the same result as the trap or accumulator of the Quick patent in suit No. 2,953,906."

Because of the conflict and contradiction between the statements in the claims and the statements in the specification of the Quick patent, the claims must be held invalid since they do not respond to the requirement of 35 U.S.C. §112, which, for the purpose of protecting the public and letting them know what has been patented, required a clear, definite statement of the purported invention in the claims.

Certainly the claims of the Quick patent are invalid since they do not contribute a single iota of new, inventive, non-obvious invention. The prior art tells what to do: any skilled refrigeration mechanic can follow the instructions of the prior art. The Quick patent attempts to repatent and monopolize that which is in the public domain. The Quick patent was correctly held invalid.

PLAINTIFFS CONSISTENTLY MISREPRESENT THE TEACHINGS OF THE PRIOR ART.

The Quick patent in suit was obtained through **misrepresentations** of the pror art to the Patent Office. The file history, Exhibit C, which includes affidavits by Mr. Wile, establishes that certain prior art references showing liquid refrigerant accumulators were misrepresented to the Patent Office as supposedly showing oil separators [Find. of Fact 27, R. 272]. **Such misrepresentations were admitted by Mr. Wile at the time of trial** [Find. of Fact 27, R. 272].

The District Court also found that the file history of the patent in suit and the unrefuted testimony of Mr. Gabriel conclusively established that **the Hart article was misrepresented to the Patent Office.** The plaintiffs there asserted that the Hart system required a heat exchanger to "re-evaporate" slugs of liquid refrigerant during the defrosting operation [Undisputed Find. of Fact 17, R. 269; Gabriel, Tr. 1437-1441]. When Hart referred to the use of a heat exchanger in the accumulator, he specifically stated it should be used "during the refrigeration cycle, but not during defrosting" [Undisputed Find. of Fact 17, R. 269; Gabriel, Tr. 1440; Ex. Q, p. 248]. The Hart heat exchanger 13, not used during defrosting, is shown in Exhibit AT included herein as Chart III. **Plaintiffs' commercial Vapot system advertised and sold by plaintiffs under the Quick patent employs the same structure as taught by Hart including such heat exchanger** [Undisputed Find. of Fact 17, R. 269; Nussbaum, Tr. 1130].

The importance and anticipatory effect of the Hart article is emphasized not only by plaintiffs' misrepresentation before the Patent Office [Find. of Fact 17] but by their further misrepresentation to this Court that:

> ". . . Hart teaches in Exh. Q that no trap should be used in the suction line as such use would be likely to produce a slug which would have to be evaporated, . . ." (App. Op. Br. p. 65, also pp. 42 and 57).

On the first page of Exhibit Q, Mr. Hart refers to a simple hot gas defrosting system wherein no liquid accumulator is provided in the suction line during the passage of hot gas through the evaporator to defrost it. In such a system, Hart teaches that the suction line **"within the refrigerated space"** should not be trapped since this might cause the collection of slugs of liquid refrigerant which would then be passed toward the compressor unless re-evaporated prior thereto. The use of the word "trap" here refers to **unintentional** trapping of liquid refrigerant in bends or low portions of the suction line which might otherwise occur in the design of the suction line within the refrigerated space. He was not referring to an "accumulator".

Immediately following the suggestions of page 1, Hart specifies that while the slow speed and wide cylinder head clearance of conventional open-type compressors allows the passage of minute droplets of liquid refrigerant *through the compressor,* the newer high speed sealed or semi-sealed compressors have much closer tolerance and cannot handle such liquid droplets. He then states:

> "The remedy in this case is an accumulator in the suction line arranged to stop the slugs of liquid, allow them to re-evaporate, and at the same time provide for the return of oil to the compressor." [Hart, Ex. Q, p. 247].

THE QUICK SYSTEM AND ACCUMULATOR ARE FULLY ANTICIPATED BY THE 1951 HART PUBLICATION.

The refrigeration system, means for hot gas defrosting and liquid accumulator, for preventing liquid slugging of the compressor, disclosed in the Quick patent (Chart I) are completely found in the disclosure of the Hart article [Exs. P & Q] published in 1951. During the trial, defendants' expert, Mr. Nussbaum, drew Exhibit AT which the District Court found correctly exemplifies the hot gas defrosting system including an accumulator as described by Hart [Find. of Fact 15, R. 269; Nussbaum, Tr. 1114-1119]. **The system described by Hart,** as exemplified by Exhibit AT, **fully meets and anticipates** the system as disclosed in **the Quick patent** in suit as to operation, function and result [Finds. of Fact 16 and 23, R. 269; Nussbaum, Tr. 1119-1122, 1126-1128].

Exhibit AT is included herein as Chart III, color coded for comparison with the system of Fig. 1 of the Quick patent (Chart I). Exhibit AT was drawn by Mr. Nussbaum by copying Fig. 3 on page 140 of Exhibit P with the addition of the combination heat exchanger and accumulator described by Hart on page 248 [Nussbaum, Tr. 1116-1118]. As seen in Chart III, the Hart system includes a compressor (orange), condensor (purple), receiver, liquid line (blue), expansion valve (purple), evaporator (green), suction line (brown) going back to the compressor and hot gas by-pass line (red) all taken from Fig. 3 on page 140 of Exhibit P [Nussbaum, Tr. 1116-1117]. A liquid accumulator 10 (yellow) having an inlet 11 and an outlet 12 is shown with a portion of the liquid line coiled up inside

the trap to provide a heat exchanger 13 within the trap which functions only during the refrigeration cycle [Nussbaum, Tr. 1117-1119, 1129].

The heat exchanger 13 of Exhibit AT and the Hart articles operates during the refrigeration cycle and helps to cool the liquid refrigerant passing from the receiver to the evaporator before it enters the expansion valve during normal refrigeration cycles [Nussbaum, Tr. 1129]. It is this heat exchanger element, **inactive during defrosting,** which the plaintiffs misrepresented before the Patent Office as serving to "re-evaporate" slugs of liquid refrigerant during the defrosting operation [Undisputed Find. of Fact 17, R. 269]. Plaintiffs now attempt to mislead this Court into believing that the accumulator [properly shown in Ex. AT] was the then well-known "Thermobank" system of Exhibits 6A and 6C (App. Op. Br. p. 22) which it is not.

During a defrosting operation, liquid and vapor or gaseous refrigerant separate in the accumulator 10 with the vapor or gas rising to the top of the tank and leaving through outlet line 12. **The oil hole in the vertical tube 12 permits small restricted or metered amounts of liquid refrigerant and oil to pass into the outlet line 12 to the compressor.** Under varying conditions, the liquid refrigerant may be re-evaporated in the suction line between the accumulator and compressor or it may reach and enter the compressor [Nussbaum, Tr. 1121-1122].

The District Court correctly found that the trap and hot gas defrosting system described by Hart and as exemplified in Exhibit AT fully meet the trap and system as disclosed in the Quick patent in suit as to operation, function and result [Find. of Fact 16, R. 269].

The Hart 1951 disclosure anticipates and precludes the novelty of the Quick patent [Finds. of Fact, 14-17, 24 and 26, Conclusions of Law 4 and 5, R. 269-273].

Appellants do not point out specifically wherein the District Court's Findings of Fact 14 through 16 are in error, but rather attempt to misrepresent the teachings of the Hart articles as suggesting that no trap should be used or that *if* a trap is used, it is intended to completely re-evaporate the liquid refrigerant "before it could be returned to the compressor" (App. Op. Br. p. 21). But, plaintiffs' contradict themselves in also saying that the Quick patent claims only require "without substantial re-evaporation" at the trap without reference to what may occur after the refrigerant leaves the accumulator on its way to the compressor (App. Op. Br. pp. 30-32).

The Trial Court's findings as to the operation of the Hart hot gas defrosting system and accumulator as exemplified by Exhibit AT are fully supported by the evidence presented through the testimony of Mr. Nussbaum at pages 1120 through 1122 of the trial transcript. The evidence before the District Court showed that Hart specifically states that there must be provision for return of oil from the accumulator into the suction line, represented by the oil hole 12 in Exhibit AT. Any such oil hole will of necessity pass restricted amounts of liquid refrigerant from the bottom of the accumulator into the suction line [Nussbaum, Tr. 1121, Also: See the identical accumulator and description thereof in the Kettering Patent, Fig. 1].

No specific means are provided at the Hart accumulator for re-evaporation of the liquid refrigerant therein [Nussbaum, Tr. 1122]. This is a requirement of the Quick claims at page 32 of Appellants' Brief. Under

favorable conditions, the heat pick-up through the wall of the accumulator may boil off the liquid refrigerant therein but under unfavorable conditions where there would be less heat pick-up through the wall of the accumulator, liquid refrigerant would enter the compressor [Nussbaum, Tr. 1121-1122], just as in the concept of the Quick system asserted in Appellants' Brief, pages 9 and 10.

Regardless of what concept is adopted by plaintiffs as to the return or non-return of liquid refrigerant to the compressor, the specific construction and functioning of the trap and hot gas defrosting system disclosed by the Hart articles, as exemplified by Exhibit AT, anticipate and fully meet the Quick patented system and trap as correctly found by the District Court. Findings of Fact 14-17, 23, 24 and 26 are supported by ample evidence and have not been shown to be clearly erroneous.

The District Court is best able to receive and weigh the value of expert testimony as to the teachings of the Hart article, Exhibits P and Q. The Appellate Court is not in a position to re-examine anew the District Court's findings as to the teachings of the Hart articles as exemplified in Exhibit AT [Find. of Fact 15 and 16] based upon the District Court's observation of the credibility of the witnesses and their testimony. The District Court has made no error. Plaintiffs should be reprimanded for their flagrant misrepresentation of the teachings and import of this Hart disclosure [Exs. P and Q] before the Patent Office and now through the fallacious arguments of counsel before this Court without regard to actual trial testimony and the interpretations made of these disclosures by persons skilled in the art.

THE ANTICIPATORY KRAMER TRENTON SURGE TANK TESTIMONY WAS CORROBORATED BY DOCUMENTARY EVIDENCE.

The Kramer Trenton Company anticipated the Quick patent by its use of the inner accumulator tank of the "Thermobank", termed a surge tank [Ex. G], beginning in 1947 to trap slugs of liquid during a hot gas defrosting cycle and hold them within the accumulator without any specific heat jacket or other means for re-evaporating the liquid refrigerant thus retained in the accumulator.

The Trial Court found that the metering accumulator used in the Kramer Trenton THAW system [Ex. 9], accused to be an infringement in this action, is in fact a horiontal version of the same identical surge tank having the same operation, function and producing the same result as the surge tanks made and sold by Kramer Trenton in 1947 and 1948 through 1955 [Find. of Fact 19, R. 270]. The District Court's findings were supported by the testimony of Mr. Nussbaum and the corroborating documentary evidence of Exhibits F through N introduced into evidence from the business files and records maintained by the Kramer Trenton Company in Trenton, New Jersey. The District Court properly found that the testimony and exhibits relating thereto established that the Kramer Trenton Company had made and sold "Thermobank" systems with or without accumulator traps known as the surge tanks more than five years prior to the time that Quick installed his first liquid trap at the Emery installation and that these surge tanks produced the same results in the same location of the refrigeration system as did

the Quick trap and the present Recold commercial devices known as Vapots [Find. of Fact 18, R. 270].

Plaintiffs attack the Kramer Trenton Company's use of the surge tanks of Findings of Fact 18 and 19 on the basis that Mr. Nussbaum's testimony was not corroborated and that Kramer Trenton Company abandoned, suppressed and concealed the surge tanks (App. Op. Br. pp. 40-41, 44-49). Significantly, no reference to any record evidence is offered by plaintiffs to support their baseless allegations.

Mr. Nussbaum's testimony on the surge tank appears in the Trial Transcript from pages 1059 through 1109. Initially Mr. Nussbaum explained how a problem of liquid overflow occurred in certain "Thermobank" installations where the "Thermobank" capacity was exceeded [Nussbaum, Tr. 1059]. He related how the concept of using liquid accumulators or traps was well-known in 1947 and to his knowledge were used on soda fountains, water coolers and domestic ice makers and were not considered an innovation [Nussbaum, Tr. 1061]. It was obvious to Nussbaum to merely use the inner tank of the "Thermobank" system (already a liquid trap) to trap whatever liquid refrigerant overflowed the "Thermobank" accumulator [Nussbaum, Tr. 1062].

Construction details of the surge tank were shown by original drawings of the Kramer Trenton Company, Exhibits F through I [Nussbaum, Tr. 1063-1077] which were used as "standard equipment" with large "Thermobank" systems [Nussbaum, Tr. 1078]. Correspondence between Mr. Nussbaum on behalf of Kramer Trenton Company and the Frigidare Sales Corporation, Acarr Supply Company and Gibson Engineering [Exs. L, M and N] indicated that surge tank drawings and specifica-

tion materials [Exs. J and K] were sent as part of the "Thermobank" systems employing the surge tanks [Nussbaum, Tr. 1084-1091].

The similarity between the defendants accused device, the THAW system of Exhibit 9, and the earlier surge tanks was shown at pages 1091 through 1109. Mr. Nussbaum's testimony was accepted by the District Court (which was best able to weigh his credibility) and was corroborated by documentary Exhibits F through N admitted into evidence. It is interesting to note that Exhibits J, K, L, M and N were all exhibits to the Nussbaum deposition [Deft. Ex. 6] in August of 1962 long prior to the trial of this action. Although plaintiffs were thus well advised as to the issues to be expected at trial, they brought forward no evidence to support their present bare allegations that Kramer Trenton Company concealed or suppressed the surge tank installations which the District Court has found were actually sold to others. Plaintiffs' cross-examination of Mr. Nussbaum [Tr. 1241, 1266-1268] in no way affected the import of his direct testimony.

The Exhibits F, G, H, and I are *original* drawings of the Kramer Trenton Company [Tr. 1063, 1072, 1075, 1074] previously maintained in the business files of the Kramer Trenton Company and were admitted into evidence **without any objection** being raised thereto by plaintiffs' counsel [Tr. 1082-1083].

Exhibits K and J are also **original documents** [Tr. 1087] which were **admitted into evidence without objection** [Tr. 1089]. Exhibit L, a carbon copy of a letter sent by Mr. Nussbaum, to Frigidare Sales Corporation in Detroit in June, 1947, was admitted to show

that the letter was sent to Frigidare with the enclosures, Exhibits K and J [Tr. 1086]. The operation of the surge tank of Exhibit J in metering liquid refrigerant at "a restricted rate through the oil return line" into the suction line is described at Transcript 1088.

Exhibit M is a carbon copy of a letter written by Mr. Nussbaum to Acarr Supply Company in October of 1947 calling the customer's attention to the special instructions of Exhibits K and J which were enclosed therein [Tr. 1089-1090]. This letter was admitted into evidence without objection [Tr. 1091]. Exhibit N is a carbon copy of a letter signed by Mr. Nussbaum and sent to Gibson Engineering in March of 1948 [Tr. 1090]. The Court properly overruled opposing counsel's objection on the ground that there was no foundation laid [Mr. Nussbaum had written the letter, Tr. 1091].

In the *Barbed Wire Patent* case, 143 U.S. 275, 284, the Supreme Court condemned the offer of proof of prior anticipations through oral testimony alone. Such is not the case here where original, dated, authenticated documents corroborating Mr. Nussbaum's testimony have been admitted into evidence without objection by plaintiffs. The District Court's Findings of Fact Nos. 18, 19, 21, 23, 24 and 26 are fully supported by clear and satisfactory evidence.

> "In order to sustain this burden, appellants were not required to prove these facts beyond a reasonable doubt. It was, however, required to prove them by substantial, clear and satisfactory evidence."
>
> *Tucker Aluminum Products, Inc. v. Grossman*, 9th Cir., 1963, 312 F. 2d 293.

THE DILEMMA OF WITHOUT SUBSTANTIAL EVAPORATION.

Appellants do not specify any error in the District Court's Finding of Fact 8 as to the function of the Quick trap in preventing "slugging" of the compressor. The identical function of restricting the rate of flow of liquid from an accumulator trap into the suction line to avoid "slugging" of the compressor is found in the prior art, as for example, in the Kettering Patent No. 1,978,463 [Finds. of Fact 10-12, R. 267-268]. Appellants therefore are forced to **create** a supposed patentable concept in the Quick claims not purportedly found in the prior art.

The Quick concept asserted at the beginning of Appellants' Brief is that the Quick trap not only accumulates the liquid refrigerant and meters it back into the suction line but does so:

> "to permit the same to pass **through the compressor** without liability of damage to the compressor . . ." (Emphasis added). (App. Op. Br. p. 10).

The Quick concept of carrying liquid refrigerant "through the head of the compressor without damage" is presented in opposition to the supposed uniform teaching of the prior art that there must be:

> "complete re-evaporation of the liquid refrigerant produced during the defrosting **before the intake of the compressor** . . ." (Emphasis added). (App. Op. Br. p. 10).

Plaintiffs uniformly assert to this Court that the only teachings of the prior art were to completely re-evaporate the liquid refrigerant **before it reaches the compressor inlet** (App. Op. Br. pp. 10-30).

The attempts of Recold to overcome the supposed skepticism of the trade to the Quick system is said to have prompted the use of demonstrators, such as Exhibit 15, to demonstrate that:

> "The liquid refrigerant formed during defrosting is **not evaporated** before it is returned **to the compressor.**" (Emphasis added). (App. Op. Br. p. 26).

The Quick patent specification and claims are asserted to teach and define a system which is "independent of 're-evaporation'" (App. Op. Br. p. 29) and "enables the liquid refrigerant to be returned **to the compressor without 'substantial re-evaporation'**" (Emphasis added). (App. Op. Br. p. 30).

Plaintiffs therefore have contended up to this point in their brief (p. 29) that the Quick concept is to return liquid refrigerant "through the head of the compressor without damage" while the prior art, to the contrary, teaches total re-evaporation of the liquid refrigerant before it reaches the compressor. Clearly, **liquid refrigerant must be returned to the compressor** without "substantial re-evaporation" in a hot gas defrosting operation to come within the Quick system concept and to avoid the prior art.

However, teachings of the Quick patent **specification,** contrary to the **claims** and the concept asserted by plaintiffs before this Court, is to re-evaporate the liquid refrigerant "for the most part" **before** it reaches the compressor [Quick Patent Ex. 1, Col. 3, lines 44-48 and Col. 4, lines 2-6.]

The patentee admitted this was true as to his installations:

> "Q. Would you say that the liquid in these prior installations, in Emery, Orr's and McKay jobs

would have substantially re-evaporated when the refrigerant was being returned to the compressor?

A. I would say so.

Q. Would your system have operated satisfactorily when you installed the trap if the refrigerant was without substantial re-evaporation? A. It would not have." [Quick, Tr. 337].

The claims of the patent in suit, however, require the return of liquid refrigerant **to the compressor without substantial re-evaporation.** They are invalid for being ambiguous because of this controversy between the patent claims and the specification and the Quick installations [Find. of Fact 25, R. 271-272; Gabriel, Tr. 1451-1461.]

Plaintiffs ignore their earlier expressed Quick "concept" and argue that the requirement of "without substantial re-evaporation" in the claims only refers to what must occur **in the accumulator trap** (App. Op. Br. pp. 31-32). They are thus in the dilemma of having stated that the Quick concept is to return liquid refrigerant **to the compressor** (to avoid the supposed prior art teachings of total re-evaporation **prior to the compressor)**, but because of the patent specification are forced to **misinterpret** the patent claims as requiring "without substantial re-evaporation" only **at** the accumulator trap and not prior to the compressor.

Plaintiffs attempt to reshape the prior art teachings at page 60 as teaching complete re-evaporation **in the accumulator trap** of liquid refrigerant before it is admitted to the suction line (to conform to their claim misinterpretation), whereas they have previously attempted to distinguish the prior art only as teaching re-evaporation of liquid refrigerant **prior** to its reaching

the **compressor** (to distinguish from the supposed Quick "concept" of returning liquid refrigerant "through the head of the compressor"). This appears to be a concerted effort to confuse the Court, misrepresent the prior art and relitigate the issues of this case without regard to the Findings of Fact and Conclusions of Law entered by the District Court.

The District Court recognized that the prior art teaches the same construction, function and mode of operation for accumulators and hot gas defrosting systems as that disclosed in the Quick patent. Quick is anticipated by the prior art and no theory of claim interpretation created by counsel can avoid the legal effect thereof of invalidating the Quick patent. Whether the Quick system operates without substantial re-evaporation of the liquid refrigerant in the accumulator trap, in the suction line prior to the inlet to the compressor or in the compressor, the same construction, arrangement and function of the individually old elements are found in the prior art and the patent is invalid.

The NUSSBAUM '310 AND KETTERING PATENTS WERE NOT BEFORE THE PATENT OFFICE.

Neither of the Nussbaum '310 nor Kettering patents [Ex. II] are references cited by the Patent Office [Ex. 1]. Neither are mentioned anywhere in the file history [Ex. C]. The District Court correctly found that the Patent Office had not considered the Kettering and Nussbaum '310 patents during prosecution of the patent in suit [Finds. of Fact 12 and 20, R. 268, 270].

Plaintiffs' only basis for arguing to the contrary is the reference to several patents "and others" at page

61 of the patent file history in an affidavit of Mr. Wile filed in 1959 [Ex. C]. During the trial, plaintiffs attempted to include all of defendants' prior art references within the "and others" [Wile, Tr. 825, *et seq.*]. Defendants' objection to the presentation of a supposed "list of such patents" was sustained by the District Court on the ground that the subject matter was outside the area of cross-examination on which plaintiffs could proceed on redirect [Tr. 27 and 30]. However, the District Court allowed plaintiffs' counsel to reopen on that issue [Tr. 832]. Counsel then stipulated that plaintiffs could read in their list of "and others" for the specific and sole purpose of alleging that the references showed "oil traps in the suction line" [Tr. 834-836].

The District Court did not exclude any of plaintiffs' evidence and did not refuse to consider it. On the contrary, the District Court did consider it, the evidence was presented, but the District Court concluded that it was **insufficient** to show that the Patent Office **had considered** these references, the Court stating on the hearing with respect to the settling of Findings of Fact:

> "THE COURT: As I recall, there was nothing in the record that showed that the Kettering patent had been brought to the attention of the Patent Office.
>
> "MR. POMS: That is right.
>
> "THE COURT: Mr. Wile did say that they had been in some manner, and I remember at the time that I did not feel that his statement was such as would be the proper basis for a finding that they had.
>
> * * *

"THE COURT: . . . but his testimony was not firm and sure that this was done." [Tr. proceedings of August 10, 1964, pp. 28-29].

Plaintiffs also **failed to place Mr. Wile in the Patent Office at an interview in 1959 to discuss the "and others"** as asserted in Plaintiffs' Brief at page 34. At the trial, Mr. Wile asserted that he had been to **only one** Patent Office interview which he recalled vividly because it was his first appearance before the Examiner [Wile, Tr. 426-427]. The photos of Exhibit 14 were supposedly shown to the Examiner at this interview [Wile, Tr. 470-472]. On cross-examination, it was conclusively demonstrated that the one interview Mr. Wile attended [Tr. 486-488] occurred earlier in 1956 [Tr. 490-498]. As is the custom, the Wile 1956 Patent Office interview is noted in the file history [Ex. C, p. 26]. The photographs of Exhibit 14 referred to were also listed in the 1956 supplemental amendment [Ex. C, pp. 28-30]. No mention is made anywhere else in the file history of any other interview at which Mr. Wile was present.

It is significant that plaintiffs do not advise this Court as to a date or record evidence for the "interview" they refer to at page 34 of their Brief. Defendants showed that the only evidence of any interview at which Mr. Wile was present occurred in 1956. The Exhibit G, page 61, portion of Mr. Wile's affidavit in which he referred to the "and others" **occurred in 1959.** Further, the "and others" referred to at page 61 of Exhibit C are supposedly referred to as showing "oil separators". The District Court correctly **found that plaintiffs were misrepresenting the prior art to the Patent Office** at this particular point [Find. of Fact 27].

The prior art patents did not show "oil separators" in the suction line but in fact showed liquid accumulators for the purpose of trapping slugs of liquid refrigerant and returning them, together with any oil inadvertently trapped, into the suction line at a restricted, metered rate. Plaintiffs' actions before the Patent Office, before the District Court, and now before this Court of Appeals are consistent in misrepresenting the facts.

THE QUICK PATENT IS ALSO INVALID BECAUSE OF QUICK'S PRIOR PUBLIC USE AND SALE.

The sales and public uses of Quick's accumulator traps in Oregon more than one year prior to the filing date of the application for the patent in suit [May 9, 1955, Ex. C] invalidate the patent **as a matter of law** (35 U.S.C. sec. 102(b)). The claims of the Quick patent in suit are not entitled to a filing date earlier than May 9, 1955, although prior applications had been filed [Exs. 2 and 3].

Plaintiffs may not rely upon the December 4, 1953 Quick application entitled "ACCUMULATOR TRAP FOR REFRIGERATION SYSTEMS" [Ex. 2] because there is no reference to this application in the patent in suit (*Hovlid v. Asari,* 305 F. 2d 747, 9th Cir. 1962).

The second Quick application, filed June 15, 1954. [Ex. 3] does not disclose a hot gas defrosting system and therefore is not a prior disclosure supporting the claims of the patent in suit:

> "A filing date, to be effective, must be that of an application which supports the claims. Appellants' earlier applications fail them in this respect."
>
> *Ruscetta & Jenny,* 255 F. 2d 687 (C.C.P.A. 1958).

The patent in suit issued from an application [Ex. C] admittedly adding new matter over the disclosure of the former application [Ex. 3], it being termed a "continuation-in-part" thereof.

> "A continuation-in-part is an application filed during the lifetime of an earlier application by the same applicant, repeating some substantial portion or all of the earlier application *and adding matter not disclosed* in the said earlier case. (In re Klein, 1930, C.D. 2; 393 O.G. 519)"
>
> *Manual of Patent Examining Procedures,* 3rd Ed., Section 201.08

The 1954 Quick application [Ex. 3] **failed to show** and/or describe **a means for defrosting the evaporator,** the patentee attempting to claim a liquid accumulator in a conventional refrigeration system. When the patentee attempted to introduce claims into the 1954 application including reference to hot gas defrosting, the Examiner **rejected** them as including "new matter".

> "Claims 9 and 10, which were added by recent amendment, are rejected on the ground of new matter. These claims mention the 'delivery of hot refrigerant' and 'means whereby the refrigerant—is delivered to the evaporator—will defrost the evaporator', which statements do not fall within the confines of the original disclosure." [Ex. 3, p. 32].

The patentee's counsel apparently expected this new matter rejection in the Exhibit 3 application because the application of Exhibit C (which issued as the patent in suit) was filed concurrently therewith. The 1955 application included as claims 1 and 2 the prior claims 9 and 10, and added a hot gas bypass line 16 to the disclosure [Ex. C, pp. 12-16]. The patentee's failure to

appeal the Examiner's holdings of "new matter" in the prosecution of the second application [Ex. 3] in favor of the third application [Ex. C] estops plaintiffs now, as a matter of law, from denying the addition of new matter to the patent in suit limiting its claims to the May 9, 1955 filing date.

> "The appellant did not seek review of that holding (new matter) of the Examiner by petition or appeal and it accordingly became final and is not subject to review here."

In re McIntosh, 230 F. 2d 615, 618 (C.C.P.A. 1958) to the same effect:

> *Philip A. Hunt Co. v. Mallinckodt Chemical Works,* 177 F. 2d 583 (2nd Cir., 1949);
>
> *Hazeltine Research, Inc. v. General Motors,* 170 F. 2d 6 (6th Cir., 1948).

In the fall of 1953 when Quick sold and installed the standard Larkin refrigeration and hot gas defrosting system at Emery's I.G.A. store in Salem, Oregon [Quick, Tr. 200], he promptly built and installed a single accumulator or trap in the suction line for that system as "an expedient" to make the system work without vibration [Quick, Tr. 203, See this Br. pp. 22-23]. In the patentee's own words, this first sale at Emery's I.G.A. store was an **"expedient".** Plaintiffs identified this Emery installation and trap as being the **first public sale** of the patented apparatus before Trial [Plaintiff's answers to defendants' interrogatories 12 and 16, Ex. KK]. Plaintiffs never withdrew, modified or denied these interrogatory answers identifying the Emery installation as the first sale of the patented apparatus. The patentee, Mr. Quick, affirmed these answers on his deposition prior to trial and during trial [Quick, Tr. 356-359].

No effort was made to hide the trap or place any limitations on the use of the successfully-operating commercial Emery system [Quick, Tr. 254-256]. The patentee never made any changes or replaced any traps and didn't go back to see the Emery installation until two or three years later, at which time it was "working fine" [Quick, Tr. 268]. As far as he knows, it is "still working fine" [Quick, Tr. 269].

Quick installed nothing but similar traps in **all** of his commercial installations after the Emery job [Quick, Tr. 297-300]. One such sale was made to McKay's Market on February 15, 1954 [Quick, Tr. 285-290]. As with the Emery trap, Quick never went back to look at the McKay trap, to repair it, or to replace it because it apparently worked fine:

> "Q. Did you have occasion to go back and look at your trap? A. No, I did not. I haven't looked at the trap for five years, I would say.
>
> Q. Well, after you installed the trap in February, 1954 in these meat case refrigeration systems, **it worked fine,** didn't it? A. **It did.**
>
> Q. **And did you ever have to make any changes in that trap?** A. **I did not."** [Tr. 292].
>
> "Q. Mr. Quick, did you instruct Mr. McKay not to show that particular trap that is shown on Exhibit AA? A. No. I had no reason to." [Tr. 297].
>
> "Q. Did you ever have to go back and repair or change this trap in the meat cooler installation in McKay's Market? A. I testified last Friday that **I never repaired or changed a trap on any installation anywhere."** [Tr. 318].
>
> "A. All that I made worked satisfactorily." [Tr. 335].

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During the trial, plaintiffs' counsel repeatedly referred to these early Quick sales as being only experimental sales. But merely calling a commercial, operating installation an experiment does not make it so. The only evidence presented of anything resembling an experiment by Quick was when he tried a warm water coil around a trap at the Orr's market job [Tr. 203-205], which was promptly abandoned [Tr. 273]. The early installation by Quick worked perfectly from the start without any change. It is well settled that once a defendant has shown an installation prior to the permitted statutory year, the burden of proof is transferred to the plaintiff who must convincingly establish actual experimentation:

> "However, once a prima facie demonstration of the claimed use has been made, the inventor carries the burden of showing that the use was not of a functionally operative device, or was substantially used for experimentation or testing purposes and this must be demonstrated by **strong and convincing proof.** National Biscuit Co. v. Crown Baking Co., 105 F. 2d 422 (1st Cir. 1939)." (Emphasis added).
>
> *Atlas v. Eastern Air Lines, Incorporated,* 311 F. 2d 156 (9th Cir. 1962).

Quick never repaired, replaced or modified a trap. There was no experimentation, but rather public use under commercial service conditions.

> "* * * the overalls embodying the patented features were complete at least by the middle of 1947 and the boy's use in November and December was one under **service conditions** to see how well the overalls filled their function rather than experimen-

tal. (Aerovox Corp. v. Polymet Mfg., 67 F.2d 860) * * *"

Merry Hull & Co. Hi-Line Co., Inc., 243 F. Supp. 45, 54 (D.C. S.D. N.Y., 1965).

The Emery trap is of substantially the same construction and operates in the same manner to produce the same result as the trap or accumulator of the Quick patent in suit [Find. of Fact 12]. The hot gas defrosting systems installed in Emery's, and thereafter in Oregon, were commercial systems [Finds. of Fact 7 and 9] sold and in public use.

"We observe in the first place, that to constitute the public use of an invention it is not necessary that more than one of the patented articles should be publicly used. * * *

"If an inventor, having made his device, gives or sells it to another, to be used by the donee or vendee, without limitation or restriction, or injunction of secrecy, and it is so used, such use is public, even though the use and knowledge of the use may be confined to one person."

Egbert v. Lippman, 105 U.S. 333, 336 (1881),

"The ordinary use of a machine or the practice of a process in a factory in the usual course of producing articles for commercial purposes is a public use."

Electric Battery Co. v. Shimadzu, 304 U.S. 5. 20 (1939).

The Quick patent is invalid under the provision of 35 U.S.C. Sec. 102(b). The weight of the evidence compels such a conclusion. Any finding to the contrary would be clearly erroneous.

THE PATENT IS INVALID BECAUSE ISSUED UPON A FALSE OATH.

Although Quick had begun installing accumulator traps on all installations after the Emery I.G.A. store job in the fall of 1953 [Quick, Tr. 297-300], he stated in the oath supporting the application filed May 9, 1955 [Ex. C] which issued as the patent in suit, that:

> "I do not know and do not believe that this invention was * * * in public use or on sale in the United States for more than one year prior to **this** application." (Emphasis added). [Ex. C, p. 15].

The patentee must be conclusively presumed to know that his oath was false since he was a party to the sales in late 1953 and early 1954 more than one year prior to the filing of the application in May of 1955 which issued as the patent in suit.

> "Under the decisions of this Court a person sued for infringement may challenge the validity of the patent on various grounds, including **fraudulent procurement.** E.g., Precision Instrument Mfg. Co. v. Automotive Maintenance Machinery Co., 324 U.S. 806, 65 USPQ 133 (1945); Hazel-Atlas Co., v. Hartford-Empire Co., 322 U.S. 238, 61 USPQ 241 (1944); Keystone Drilling Co. v. General Excavator Co., 290 U.S. 240, 19 USPQ 228 (1933)."
>
> *Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp.,* 382 U.S. 172, 86 S. Ct. 347, 15 L. Ed. 247 (1965).

The patentee, Quick, and Recold's officers and attorney, in complete disregard of the prior commercial installations of Quick, deliberately and knowingly obtained an invalid patent and brought this suit with that knowledge. The patent in suit is not only invalid for the many

grounds relied upon by the District Court in its Findings, because of the prior public use and sale, but also because of this **fraud** upon the Patent Office in asserting the absence of prior public use or sale more than one year prior to May 9, 1955.

CONCLUSION.

The District Court's conclusion of patent invalidity should be affirmed. Plaintiffs have failed to show that the trier of fact made any findings which are either clearly erroneous or contrary to the weight of the evidence. They have not demonstrated any erroneous application of law to the facts. Plaintiffs' arguments on appeal as to what the Findings should have been in their view are without merit.

The conclusion that the Quick patent is merely an obvious old combination of old elements is inescapable. It is no more than the result of the exercise of ordinary skill by a refrigeration mechanic who installed a simple liquid refrigerant trap as an "expedient" on a job where he was attempting to avoid the use of the prior "Thermobank" liquid accumulators he was familiar with. The trap employed by Quick is found in prior patents, such as the Kettering, British, and other prior art patents of defendants' Exhibit II. The same complete hot gas defrosting system and liquid accumulator were taught by the prior Hart article [Exs. P, Q and AT], the Nussbaum '310 patent and were actually publicly used and sold by the Kramer Trenton Company more than five years prior to Quick as "surge" tanks in Kramer Trenton hot gas defrosting systems [Exs. F-N].

The Quick patent adds nothing to the sum of useful knowledge, it does not satisfy the constitutional stand-

ard referred to in the well-known *A & P Supermarket* case, *supra,* and is invalid.

> "Innovation, advancement, and things which add to the sum of useful knowledge are inherent requisites in a patent system, which by constitutional command must 'promote the progress of . . . useful art.' This is the standard expressed in the constitution and it may not be ignored."
>
> *Graham v. John Deere Company of Kansas City, supra,* 86 S. Ct. at 688.

The Quick patent is invalid because it is not novel (35 U.S.C. Sec. 101), because it was in prior public use and was on sale more than one year prior to the filing of a disclosure in the Patent Office which could support the claims sought (35 U.S.C. Sec. 102(b)), because it is obvious to one skilled in the art (35 U.S.C. Sec. 103), because the claims obtained were so changed to avoid the cited prior art in the Patent Office that they no longer define nor distinctly claim the system disclosed in the Quick patent specification (35 U.S.C. Sec. 112) and because the patent was obtained by fraud, the plaintiffs misrepresenting prior art patents and publications to the Patent Office and knowingly filing a false oath with the May, 1955 application.

The metering accumulator used in the defendants' "THAW" system, accused to be an infringement in this action, is merely a horizontal version of the old surge tank used in the same combination with the same operation, function and result as the early Kramer Trenton surge tanks made and sold by Kramer Trenton more than five years before Quick. The plaintiffs' many misstatements, misrepresentations and instances of overreaching outlined herein, are all designed to create a

patent monopoly by semantics out of the prior art heretofore available to the public and to those skilled in the art.

The Judgment below shold be affirmed. It is further requested that in view of the plaintiffs' misconduct before the Patent Office in obtaining the Quick patent and before this Court in attempting to enforce it on defendants unfairly and in bad faith, that the Court further instruct the District Court that this is an exceptional case justifying the award of attorney's fees to defendants.

C. A. Miketta,
William Poms,
Guy Porter Smith,
of
Miketta, Glenny, Poms & Smith,
Attorneys for Appellees.

Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

C. A. Miketta

No. 19833

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

Recold Corporation,
a corporation, and
Lester K. Quick,

Appellants,

vs.

David A. Nurse, dba
David A. Nurse Company, and
Hugh Robinson & Sons, a
corporation,

Appellees.

APPELLANTS' REPLY BRIEF

Lyon & Lyon
Lewis E. Lyon
811 West Seventh Street
Los Angeles, California 90017

Attorneys for Appellants Recold Corporation and Lester K. Quick

Jeffries Banknote Company, Los Angeles — MA 7-9514

Subject Index

Table of Cases

Statutes

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APPELLANTS' REPLY BRIEF

Appellees, in their brief, rely almost exclusively upon the assertion that a "trap" is old. This assertion is immaterial and in no way determinative either from a standpoint of fact or law in this action. The claims in issue are (1) a method claim which provides:

> "1. A method of operating and defrosting refrigerating apparatus comprising, the steps of; compressing a gaseous refrigerant, passing said compressed refrigerant gas through an evaporator to defrost the same, withdrawing gas and condensed liquid from said evaporator, collecting said condensed liquid in a body, establishing a stream of said withdrawn gas and directing said stream to flow away from said body of liquid from a point there-

above, metering liquid from said body into said stream flowing away from said body at a predetermined rate, and without substantial re-evaporation of the said liquid and re-compressing said stream of gas and liquid to repeat said cycle."

and (2) apparatus or combination claims 2, 3, 4, 5, and 8, claim 4, for example, which provides:

"4. In a refrigerating apparatus, a compressor, a condenser for condensing compressed gas to a liquid, an evaporator connected to said condenser through expansion means, a by-pass means for selectively conducting compressed gas from said compressor to said evaporator for defrosting the same, a return line from said evaporator to said compressor, a trap in said return line and comprising a closed chamber, said return line having an inlet leg and an outlet leg in said chamber, each of said legs having an open end in said chamber above the bottom thereof, a metering conduit in said chamber having one end thereof adjacent the bottom of said chamber and extending upwardly therefrom with its other end extending into said outlet leg and facing in the direction of gas flow therein whereby any liquid refrigerant in the bottom of said chamber is aspirated into said outlet leg at a controlled rate."

It is the presumption of law that each element of a combination claim is old.

Wham-O-Mfg. Co. v. Paradise Manufacturing Co., 327 F. 2d 748 (C.A. 9, 1964);

Aetna Steel Products Corporation v. Southwest Products Company, 282 F. 2d 323 (C.A. 9, 1960);

Pointer v. Six Wheel Corporation, 177 F. 2d 153 (C.A. 9, 1949);

Oliver United Filters, Inc. v. Silver, 206 F. 2d 658 (C.A. 10, 1953).

An invention directed to a method is independent of the apparatus used to carry out that method and that the apparatus may be old separately considered is of secondary consequence and does not invalidate the process or method patent.

Fermentation Co. v. Maus, 122 U.S. 413, at 428.

The mere existence of a trap or that that trap might be made useful for carrying out the particular process of the Quick patent is not anticipatory of the method claim of this patent.

Carnegie Steel Company v. Cambria Iron Company, 185 U.S. 403, at 424-425.

See also:

Risdon Iron and Locomotive Works v. Medart, 158 U.S. 68, at 75-76;

In re Walch et al., 87 F. 2d 511, at 513 (C.C.P.A. 1937): and

City of Milwaukee v. Activated Sludge, 69 F. 2d 577, at 588 (C.A. 7, 1934).

Appellees in their brief assert on page 3 thereof, Point 1, that plaintiffs have not defined the invention of the Quick patent. In this respect appellees have ignored completely the statement of invention set forth by appellants in their Opening Brief, pages 9 and 10, under the heading "The Quick Concept". However, if there can be any question with respect to this matter the invention made by Quick and as defined by the claims of the Quick patent here in suit resides in a method and apparatus for defrosting the evaporator of a refrigeration system which employs hot gas as a medium of delivering heat

to the evaporator to melt the frost and wherein the refrigerant which leaves the evaporator after defrosting as both a liquid and gas is in the suction or low pressure line separated into liquid and gaseous refrigerant wherein the flow of the liquid refrigerant is delayed or held from free flow to the compressor and is then metered back into the free flowing gaseous refrigerant at a controlled rate so that it is in effect returned to the gaseous refrigerant as more or less of a fog or in such dispersion that the compressor can handle and will handle the gaseous refrigerant in which the liquid refrigerant is dispersed in small quantities so that during the re-compression cycle of the refrigerant the total refrigerant passes through the compressor. The dispersion of the liquid refrigerant in this manner into the gaseous refrigerant enables the compressor to operate without damage to the compressor and without liability of breakdown and enables the system to operate under all conditions which must be met by such refrigeration apparatus. The Quick patent in suit is the first and only disclosure that the system of hot gas defrost can be operated without the addition of heat to the liquid refrigerant leaving the evaporator by separating the gaseous and liquid refrigerant between the evaporator and the compressor as the sole means of returning the combined refrigerant, liquid and gas, to the compressor and obviates what Quick sought to do as admitted in the appellees' brief to avoid the purchase of an expensive re-evaporator, i.e., the Kramer Company expensive Thermobank system (Appellees' Brief, page 23):

> "Quick apparently did not want to spend money for a 'Thermobank' so he built his own trap and was proud that: * * *"

A fair rating of all of the prior art relied upon by the appellees will demonstrate to this Court that the art

believed before the Quick invention that when the hot gas system of defrosting was employed it was necessary to effect complete re-evaporation of the liquid refrigerant in the suction line between the evaporator and the compressor before the refrigerant was returned to the compressor. Quick first discovered and first taught this art that all of the consequent expense of such re-evaporation of the liquid refrigerant could be successfully avoided by separating the gaseous refrigerant from the liquid refrigerant in the suction line and then at a controlled rate returning the liquid refrigerant to the gaseous refrigerant and that this could be accomplished without the aid of or consequent expense of effecting re-evaporation of the liquid refrigerant to any substantial degree. In the Quick method and apparatus the separated liquid refrigerant is returned to the suction line without substantial re-evaporation during its separation.

The proof that this constituted invention and is the mode of operation and method followed through the medium expedient utilized by the art subsequent to Quick's teaching becomes obvious from the proof that in the thaw system used by the defendants some fifty odd pounds of liquid refrigerant would be returned to the compressor without utilizing the Quick invention. This fact was admitted by defendants' Chief Engineer, Mr. Nussbaum, in the process of his cross-examination as particularly set forth by appellants in their Opening Brief, pages 61 to 63, inclusive.

The Quick invention was not believed to be an operative suggestion. Its disclosure to Kramer Trenton, when Quick sent his application to them, was ignored. Recold, appellant, was so skeptical that it spent months in field testing. Kramer Trenton, the real party here in interest, began copying the Quick invention after seeing the Recold demonstration at the Atlantic City Industry

Show [Tr. 1241 to 1248]. This copying followed the Kramer Trenton asserted attempt to supplement the Thermobank system with the closed trap of the Nussbaum patent. The question obviously unanswered by the defendant's (Kramer Trenton's) testimony here is, would there be the Quick system, which is not dependent on evaporation of the liquid refrigerant, without the Quick invention? Kramer Trenton did not produce it; no one else produced it. It remained for Mr. Quick, a field service man, to make the discovery from necessity. Quick taught the art that in a hot gas defrost system he could separate the liquid refrigerant out and then meter it back into the gaseous refrigerant, that during the separation there was no substantial re-evaporation, and that the hot gas defrost system could thus operate under all conditions, without liability of breakdown. This was contrary to the beliefs of the published art as demonstrated in our Opening Brief. It was contrary to the published statements of Mr. Nussbaum and Mr. Kramer of Kramer Trenton Co. It was so contrary to the beliefs of this art that Kramer Trenton only went to the Quick invention after observing its demonstration. Copying of this character is one of the most reliable tests of invention.

The Filtex Corporation v. Amen Atiyek,
216 F. 2d 443, 444-445 (C.A. 9, 1954);

The Troy Company v. Products Research Company,
339 F. 2d 364, 366.

The Patent Art Relied Upon Does Not Disclose the Quick Invention

As to the published art, i.e., the prior patents and the publications, this Court has repeatedly stated that it is capable itself to judge of the sufficiency of their teach-

ing. Particularly is this true of a non-complex invention as is here before this Court.

In the first instance, to be anticipatory, this prior teaching must be that the very old hot gas defrosting system could be made operative under industry conditions without re-evaporation of the liquid refrigerant. There simply isn't any such teaching prior to the Quick invention. In this respect the facts of this case are strictly comparable to those before the Supreme Court in *Carnegie Steel Company v. Cambria Iron Company,* 185 U.S. 403. After reviewing completely the evidence the Court stated in quoting from *Loom Co. v. Higgins,* 105 U.S. 580, 591:

> ". . . 'But it is plain from the evidence, and from the very fact that it was not sooner adopted and used, that it did not, for years, occur in this light to even the most skillful persons. It may have been under their very eyes, they may almost be said to have stumbled over it; but they certainly failed to see it, to estimate its value, and to bring it into notice. . . . Now that it has succeeded, it may seem very plain to any one that he could have done it as well. This is often the case with inventions of the greatest merit. It may be laid down as a general rule, though perhaps not an invariable one, that if a new combination and arrangement of known elements produce a new and beneficial result, never attained before, it is evidence of invention'." (446)

A trap used under other conditions, not of hot gas defrosting, and even if used as a supplement to a re-evaporating system, is just not the teaching of Quick.

> *Trabon Engineering Corporation v. Dirkes, et. al.,* 136 F. 2d 24 C.A. 6 (1943).

Prior structures which by modification might be made to perform functions of a later patented device are not anticipations where not designed, adapted to nor used for such functions, and prior patents cannot be modified or reconstructed in the light of the subsequent invention to build up an anticipation.

Silver-Brown Co. v. Sheridan et al., 71 F. 2d 935, C.A. 1 (1934), *Cert. denied* 293 U.S. 590, 79 L. Ed. 685 (1934);

Young Radiator Co. v. Modine Mfg. Co., 55 F. 2d 545, C.A. 7 (1932);

H. W. Peters Co., Inc. v. MacDonald, 59 F. 2d 974, C.A. 2 (1932), *Cert. denied* 287 U.S. 659, 77 L. Ed. 569 (1932);

Trico Products Corporation v. Apco-Mossberg Corporation, 45 F. 2d 594, C.A. 1 (1930);

Gordon Form Lathe Co. v. Walcott Mach. Co. 32 F. 2d 55, C.A. 6 (1929);

Payne Furnace & Supply Company v. Williams-Wallace Co., 48 USPQ 575, 117 F. 2d 823, C.A. 9 (1941), *Cert. denied,* 49 USPQ 756, 313 U.S. 573, 85 L. Ed. 1530;

Diamond Power Specialty Corporation v. Bayer Co., 13 F. 2d 337, C.A. 8 (1926);

Naylor et al. v. Alsop Process Co., 168 F. 911, C.A. 8 (1909);

In re Hummer, 113 USPQ 66, 241 F. 2d 742 (1957);

Steiner Sales Co. v. Darman Mfg. Co., Inc. et al., 33 F. Supp. 422, D.C. N.Y. (1940).

It is not alleged and it is not found by the lower court that the Quick invention, in its entirety, is found either

in the prior patents or in the publications. This Court has said many times that where the proof lies in written documents the findings based thereon are not conclusive, but that this Court is able to read those writings and draw its own conclusions therefrom. In this case that is what appellants are requesting this Court to do. These writings, i.e., patents and publications, read completely, and not as to excerpts thereof taken out of context, clearly teach that re-evaporation must be had before reaching the compressor. Mr. Nussbaum's testimony, read completely, and not by excerpts taken out of context, also affirms the belief of the prior art. We are not here setting forth excerpts of that testimony because to do so may mislead. The Nussbaum testimony which is most demonstrative is found at Tr. 1059, 1062, 1068, 1070, 1071, 1072, 1094, 1097, inclusive. Consider this testimony in the light of Mr. Nussbaum's contemporaneous writings, and those writings of Mr. Kramer which he edited, as set forth in our Opening Brief. The entire review of this material will lead to one conclusion and that is had not Kramer Trenton copied the Quick demonstration unit, and were it not for the Quick invention, the entire art would still follow the teaching of the necessity of total re-evaporation, i.e., that addition of heat was a necessity, that un-evaporated liquid refrigerant could not be returned to the compressor in a hot gas defrost system. Where there is total absence of the teaching of the operation with its ultimate result in the art, that art cannot be said to negative invention. So that tested by the premise "that which infringes if later anticipates if earlier" (*Killefer Mfg. Co. v. Dinuba Associates, Limited,* 67 F. 2d 362 (C.A. 9, 1933), it is obvious that the invention of the Quick patent is not found in the art. The Nussbaum, Kettering, Hart, and all the other patents relied upon by appellees, each of which fails to teach the

mode of operation of or to disclose the result of Quick, would not infringe the Quick patent.

Where there is no teaching of the solution to the problem the art does not negative invention.

> *Williams Iron Works Co. v. Hughes Tool Co.*, 109 F. 2d 500 (C.A. 10, 1940).

The claim that Quick's installation made in Emery's store (Appellees' Brief, page 22) and in other installations in Oregon is anticipatory, is answered completely by Quick's testimony of his experimentations, and further by the series of continuing patent applications filed by Quick, which are continuations of each other. That Quick made only experimental tests, made no charge therefor, continuously observed the operations, changed the installation to remove the heat coils therefrom, and that plaintiff Recold's continued experimentation and testing to within the statutory period of the filing of the last of the Quick applications, is fully established by this record (Appellants' Opening Brief, page 4). In accordance with 35 U.S.C. § 120, the effective date of the Quick patent is the date of these early applications.

The continued experimentation of Quick to within the critical date of the application for the patent is as stated by Quick with reference to the Emery store in Salem:

> "I began to realize that maybe my preconceived ideas that heat was absolutely necessary to effect hot-gas defrosting were not so. I therefore went back to my shop and started experimenting. Since I had another installation going in my home town only a few blocks from our office, in which we were to install two frozen-food cases, I proceeded to construct a more properly engineered accumulator to install on this job as an experiment to see if what I had observed was really true.

Q. and in that regard what did you do?

A. I purchased a Kramer Thermobank properly sized for this job just in case it didn't work. I manufactured the accumulator very much as I described; however, being still not convinced that I did not have to have heat I carefully coiled a coil of copper piping around the total exterior surface of this accumulator, soldered this coil to the surface of the accumulator for good heat exchange effect, and made provisions so that I could run warm water through this pipe during the defrosting process if I found it necessary." [Tr. 203-204].

Further, Mr. Quick testified that he experimented on this hot water heat exchanger for approximately a week using recording equipment. Examination of this recording equipment indicated that this system was defrosting as well as any Kramer Thermobank he had installed. He also turned off the switch, which completely took the exchanger out of service, and could determine very little difference in operation from the recording charts.

Furthermore, Mr. Quick testified that at this second market he recorded the operation for about three weeks and returned periodically to inspect the cases to see if ice was forming in the pan or the bottom portion of the cases. During this time neither customer knew of this experimentation, and it was not until Mr. Wile and Mr. Jarvis came to Eugene to visit this job that any one knew that there was anything installed in their store different than the normal installations [Tr. 205].

Further experimentation was carried on at a third installation where vapots were installed and experimented on for two months. The results of these tests indicated that meat shrinkage was less than half of what it had previously been and the bloom condition of his meat was substantially improved [Tr. 208].

The continued experimentation by Quick is clearly within the law a lawful effort to bring the invention to perfection within the ruling of the Supreme Court in *Elizabeth v. Pavement Co.,* 97 U.S.C. 126, and as this ruling is followed in *Amerio Contact Plate Freezers, Inc. v. Belt-Ice Corporation et al.,* 316 F. 2d 459 (C.A. 9, 1963). See also:

Andrews v. Hovey, 123 U.S. 267, and

Smith and Griggs Mfg. Co. v. Sprague, 123 U.S. 249 (1887).

The claim is made by appellees that the invention of Quick was obvious as a matter of law as stated by this Court in *National Sponge Cushion Co. v. Rubber Corporation,* 268 F.2d 731, C.A. 9 (1961), 128 USPQ 320. The facts are that the Quick invention is not taught by the references. The Hart article relied upon clearly teaches the necessary use of heat to re-evaporate the liquid refrigerant.

At page 31 of Appellees' Brief it is stated that plaintiffs misrepresented the teachings of Hart in Exhibit Q by stating that Hart teaches that no trap should be used in the suction line, that the use of the word "trap" refers to unintentional trapping of the liquid refrigerant in the refrigerated space.

Appellants assert that Hart does, however, teach that:

> "The remedy in this case is an accumulator in the suction line arranged to stop the slugs of liquid, *allow them to re-evaporate,* and at the same time provide for the return of oil to the compressor." (Hart, Ex. Q, p. 247, Appellees' Brief, page 31). (emphasis ours)

Hart teaches re-evaporation, the very problem which Quick avoided. Hart in this teaching is diametrically

opposed to Quick, and this is tacitly admitted by appellees in their brief.

Furthermore, the Hart article refers to small commercial systems where it may be unnecessary to make special provisions for re-evaporating the refrigerant when high speed compressors are used. The author stated at p. 248, col. 2, Exhibit Q:

> " . . . The author has found it imperative to protect the newer types of high speed compressors against slugging of refrigerant by one of several devices, especially in low temperature fixtures.
>
> The most simple device known to the author is a combination heat exchanger and accumulator. . . . It amounts to an enlarged section of suction line with a portion of the liquid line coiled up inside to simulate a heat exchanger during the refrigeration cycle but not during defrosting. The function of this device is to trap any slugs of liquid before they reach the compressor, regardless of the rate at which hot gas is metered into the evaporator and *retain this refrigerant until it has 'boiled off' from the combined action of the suction and the heat pick up through the wall of the device.* In a real sense it acts as insurance against compressor trouble, *especially when placed outside of the refrigerated area, or in such a position within the refrigerator that it can pick up some heat.*" (emphasis added)

The combined action referred to is the exchange of heat from the walls of the device and the suction, or more properly the reduction from atmospheric or internal pressure which in turn lowers the volatilization point of the liquid refrigerant and aids in "boiling off" this refrigerant.

Exhibits P and Q are their own best evidence and speak for themselves, and reading of these articles in light of the Quick disclosure clearly demonstrates that there cannot be any possible anticipation.

There is No Adequate Proof that Surge Tanks Were Ever Used

In the *Barbed Wire Patent Case,* 143 U.S. 275, 284, the Supreme Court condemned the offer of proof of prior anticipation through oral testimony alone. No person other than Nussbaum testified before the Court as to the existence of any such system and Mr. Nussbaum clearly failed to include any such system within the disclosures of any of the patent applications which he filed subsequent to this alleged use.

With regard to Mr. Nussbaum's actual testimony he:

> ". . . made a recommendation to the management of the Company that an additional trap be installed between the outlet 4 of the Thermobank and the compressor suction inlet, which would serve to intercept excess liquid that would be overflowing the Thermobank, separate that excess liquid from vapor, and return only vapor to the compressor and arrest the excess liquid until it might have been re-evaporated by the warmth of the surrounding air. . . ." [Tr. 1061];

and further at 1067 Mr. Nussbaum testified:

> ". . . that was the purpose of the surge tank, to trap liquid refrigerant during defrosting and to permit only passage of vapor back into the suction line."

Therefore, the surge tank cannot be anticipatory of the Quick invention nor of the Recold vapot. Mr. Nuss-

baum testified that these surge tanks or the use thereof was "recommended" to the management of Merrimac Locker Plant in Exeter, New Hampshire, and Morrill's Food Locker in Deering, Maine. Drawings were produced from Mr. Nussbaum's files, but there is no corroborated testimony nor documents to either show that these surge tanks were in fact used or had ever been used or installed in any installation.

The Purported Dilemma of Without Substantial Evaporation

The appellees attempt to cloud the issues in this case by misrepresenting the facts, testimony, specification and claims of the patent in suit.

However, in their brief appellees admit that in a hot gas defrost system that liquid refrigerant returning to the compressor without substantial re-evaporation would avoid the prior art (Appellees' Brief, p. 41).

Then appellees attempted to mislead this Court by partial quotation from Mr. Quick's testimony at page 337 of the transcript.

> "Q. Would you say that the liquid in these prior installations, in Emery, Orr's and McKay jobs would have substantially re-evaporated when the refrigerant was being returned to the compressor?
>
> "A. I would say so.
>
> "Q. Would your system have operated satisfactorily when you installed the trap if the refrigerant was without substantial re-evaporation?
>
> "A. It would not have. I would have to correct that statement slightly, because I am assuming in your question that you are assuming that the trap

were not separating out the liquid. I also stated that I placed the traps in various positions in the suction line so that I could test whether enough liquid was being returned at fast enough rate to cause damage to the compressor and I placed in one of these pictures that you have the trap directly in front of the compressor, where the liquid would no doubt have come into the compressor very directly, on purpose to test this.

"Q. Are you telling us that with your trap, then, the liquid in this last installation where you just put the trap in the suction line just prior to the compressor, are you saying now that in that installation the refrigerant was being returned to the compressor without substantial re-evaporation?

"A. It was being returned to the suction valve of the compressor with much less re-evaporation that it would have been at a further distance.

"Q. If the trap was at a further distance in the suction line from the compressor, then the suction line would have operated as a re-evaporator to evaporate a refrigerant, is that correct?

"A. It would have evaporated more of it, at least."

[Tr. 337-338.]

The specification of the Quick patent (column 3, lines 44-48, and column 4, lines 2-6) cannot be read without the light of the claims. The specification teaches what probably happens in the line returning to the compressor is that at any given instance of time, some liquid will evaporate. The claims describe what happens in the accumulator, as previously pointed out in this brief. As to any dilemma in this respect, appellees' arguments are unfounded and wholly without merit.

In this case appellees have not only seen fit to assert, without in any way demonstrating the basis of such assertion, that appellants have sought to misrepresent the facts to this Court, but have resorted to personal vindications, which are likewise groundless. The misrepresentations made to the Patent Office concerning the operation being dependent on metering the liquid refrigerant into gaseous refrigerant *without* substantial re-evaporation are proven to be factually correct. Mr. Nussbaum so testified with reference to the defendants' operation [Tr. 1558, Vol. 13—Appellants' Opening Brief, page 61]. That the patents and publications of the art so taught is fully established in our Opening Brief, pages 42 to 60.

Conclusion

It is here shown that Mr. Quick taught the art that the very old hot gas defrost system could be operated without liability of destruction of the compressor, and without re-evaporation of the liquid refrigerant. He taught that the large volume, fifty pounds of liquid refrigerant, could be metered at a controlled rate into the suction line with the gaseous refrigerant, and that the liquid so returned in metered quantities would not damage the compressor. The practice of the art and belief of using heaters and re-evaporators in the suction line, a very expensive and not fully reliable operation, was avoided. Quick overcame this problem in face of the teachings and beliefs of the industry. He, Quick, a refrigeration service man, did what the engineers in this art had failed to accomplish. The Quick patent should be sustained. This was a problem of long standing, the art had long sought the solution, and Quick's very simple solution has every element of invention.

> *Payne Furnace & Supply Co., Inc. v. Williams-Wallace Co.,* 117 F. 2d 823, C.A. 9 (1941);

Safety Car Heating & Lighting Co., Inc. v. General Electric Co. et al., 155 F. 2d 937, C.A. 2 (1946);

Pointer v. Six Wheel Corporation, 177 F. 2d 153 C.A. 9 (1949);

Wham-O-Mfg. Co. v. Paradise Manufacturing Co., 327 F. 2d 748, C.A. 9 (1964);

Aetna Steel Products Corporation v. Southwest Products, 282 F. 2d 323 C.A. 9 (1960).

Respectfully submitted,

Lyon & Lyon

By Lewis E. Lyon

Attorneys for Appellants

Certificate

I certify that in connection with the preparation of this Brief I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit and in my opinion the foregoing brief is in full compliance with those rules.

Lewis E. Lyon

Appeal No. 19,859

In the

United States Court of Appeals

For the Ninth Circuit

BRUNSWICK CORPORATION,
Appellant,
vs.
COLUMBIA INDUSTRIES, INC.,
Appellee.

COLUMBIA INDUSTRIES, INC.,
Appellant,
vs.
BRUNSWICK CORPORATION,
Appellee.

On Appeal from the United States District Court for the Eastern District of Washington, Northern Division.

PETITION FOR REHEARING OF BRUNSWICK CORPORATION, APPELLANT.

Brunswick Corporation,
By John Rex Allen,
Attorney for Appellant.

Of Counsel:
Hofgren, Wegner, Allen, Stellman & McCord,
James R. Sweeny,
20 North Wacker Drive,
Chicago, Illinois 60606,
Cashett, Williams, Connelly & Rekofke,
James P. Connelly,
650 Lincoln Building,
Spokane, Washington 99201,
Henry Gifford Hardy,
1811 Mills Tower,
San Francisco, Cal. 94104.

THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

In the

United States Court of Appeals

For the Ninth Circuit

BRUNSWICK CORPORATION,
Appellant,
vs.
COLUMBIA INDUSTRIES, INC.,
Appellee.

COLUMBIA INDUSTRIES, INC.,
Appellant,
vs.
BRUNSWICK CORPORATION,
Appellee.

PETITION FOR REHEARING OF BRUNSWICK CORPORATION, APPELLANT.

To the Honorable J. Warren Madden, Judge of the United States Court of Claims, Frederick G. Hamley and Gilbert H. Jertberg, Circuit Judges:

Brunswick Corporation, appellant, respectfully petitions the Court to reopen and rehear the portion of the case which holds claims 12, 14, 15 and 16 of Patent No. 3,068,007 issued to Brunswick on December 11, 1962 as assignee of the inventor Fred E. Satchell are invalid for lack of invention.

The grounds relied upon for this petition for rehearing are the following:

The Court has overlooked the primary ground upon which the appeal herein was predicated, to-wit: a new and patentable product was obtained by the teaching of the patent in suit which for the first time provided a

bowling ball that had the necessary bowling characteristics *and* great esthetic appeal or beauty.

In support of this ground Brunswick cited cases which held that for a product to be patentable it was not necessary for the product to operate in a manner superior to that of the prior art (Opening Brief, p. 17) and that improved utility and patentability resulted from making a product which had greater appealability to the eye (Opening Brief, pp. 16-18). The Court in its opinion has completely ignored these points and has thereby impliedly reversed the substantial body of law in support thereof.

The decision of this Court erroneously states (p. 5) that Brunswick does not claim that its bowling ball has greater utility than the old black bowling ball. This is contrary to the argument referred to above and the cases in support thereof on which Brunswick has relied in support of its patent.

Brunswick is entitled to a rehearing to point out this serious attack on a well recognized body of law.

Respectfully submitted,

Brunswick Corporation,
By John Rex Allen,
Attorney for Appellant.

Of Counsel:
Hofgren, Wegner, Allen, Stellman & McCord,
James R. Sweeney,
20 North Wacker Drive,
Chicago, Illinois 60606,
Cashatt, Williams, Connelly & Rekofke,
James P. Connelly,
650 Lincoln Building,
Spokane, Washington 99201,
Henry Gifford Hardy,
1811 Mills Tower,
San Francisco, Cal. 94104.

I hereby certify that in my judgment the above Petition for Rehearing of Brunswick Corporation, Appellant is well founded. It is not interposed for delay.

JOHN REX ALLEN.

Chicago, Illinois,

June 15, 1966.

Aug. 14, 1951 O. J. NUSSBAUM et al

MEANS FOR CONTROLLING THE HEAD PRESSURE IN REFRIGERATING SYSTEMS

Original Filed June 20, 1947

3 Sheets-Sheet 2

Fig. 4

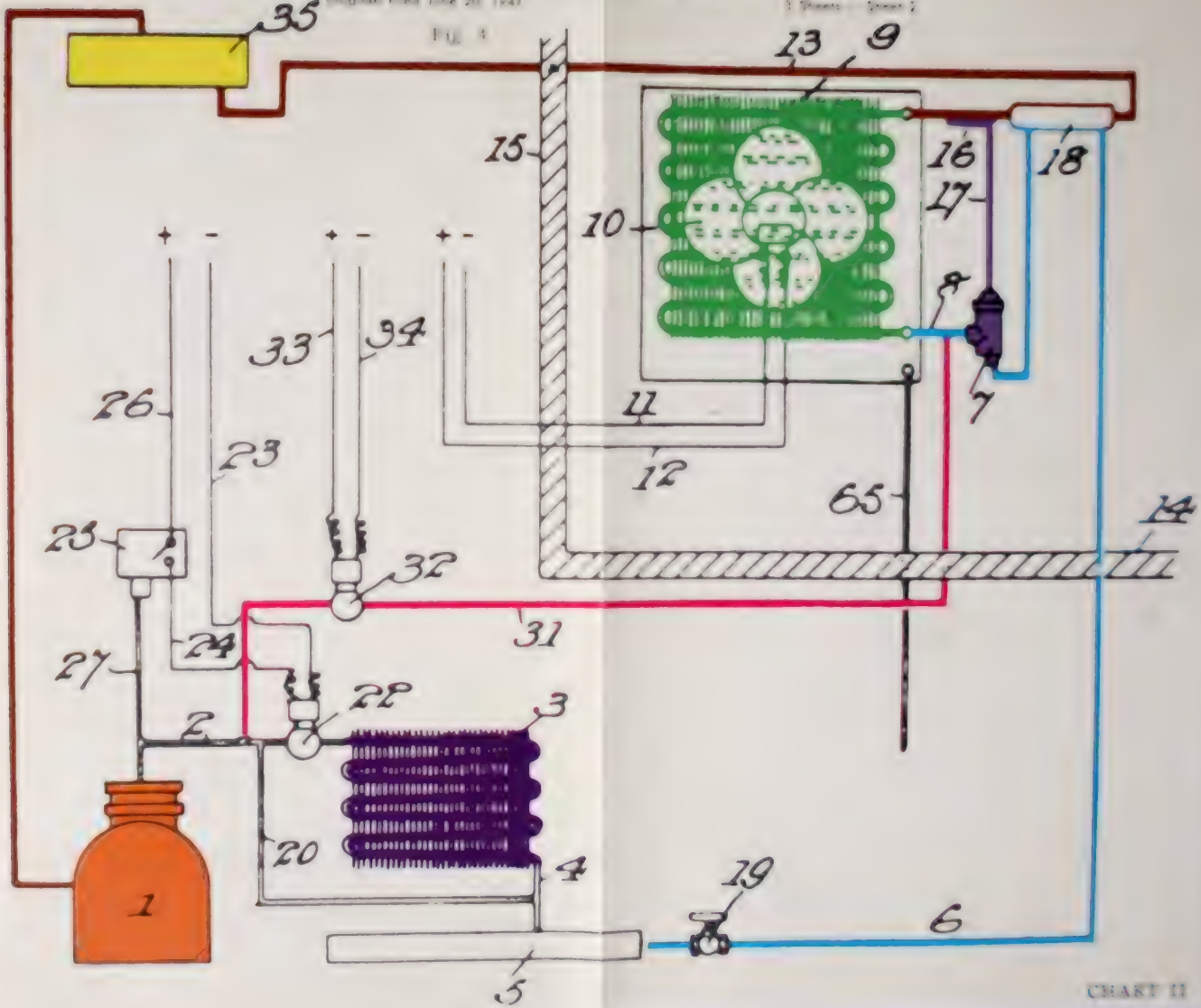

CHART II

EXH P
FIG 3
p.140
AT

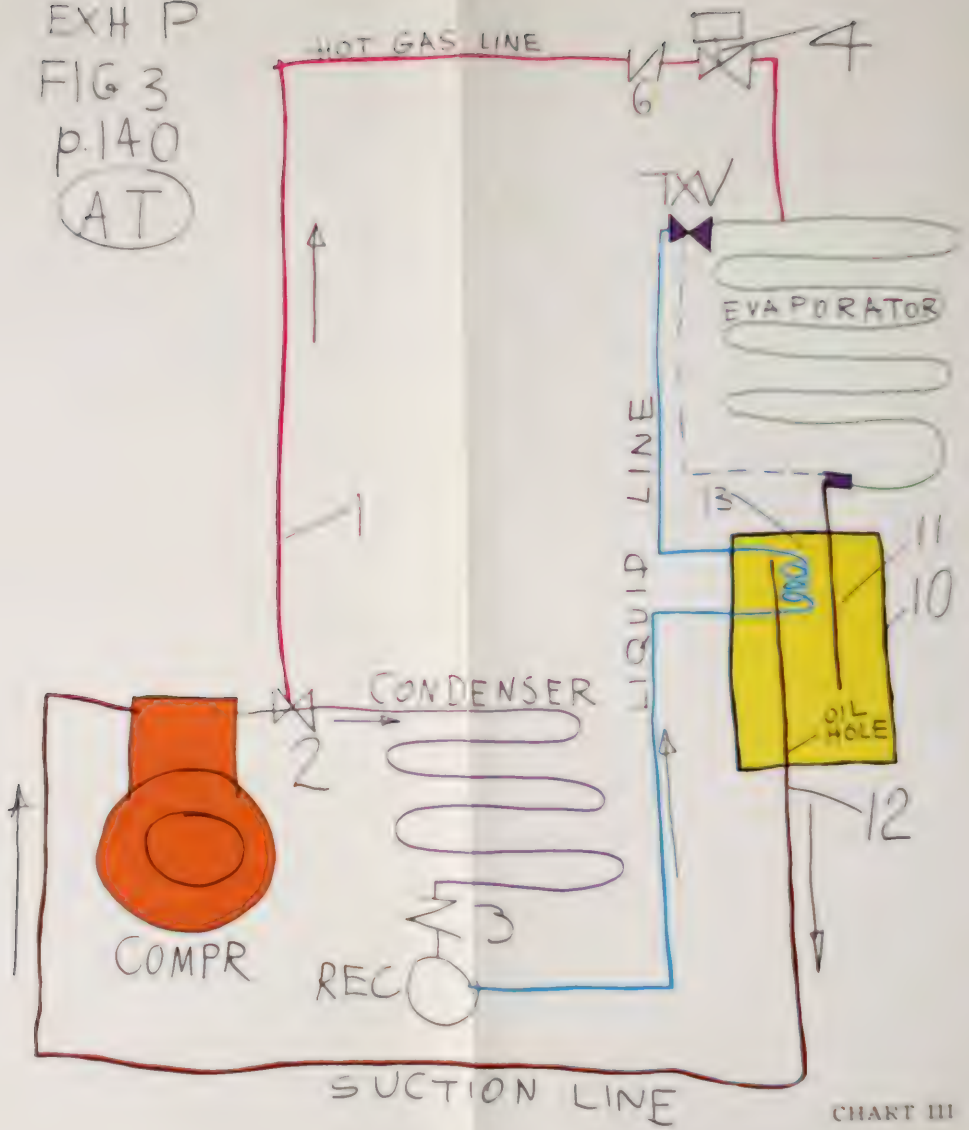

CHART III

NO. 19861

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

HUMBERTO COLLAZO,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

MANUEL L. REAL,
United States Attorney,
JOHN K. VAN DE KAMP,
Assistant U. S. Attorney,
Chief, Criminal Division,
ROBERT L. BROSIO,
Assistant U. S. Attorney,
Assistant Chief, Criminal Division,
JULES D. BARNETT,
Assistant U. S. Attorney,
Chief, Fraud Section,
Criminal Division,

600 U. S. Court House,
312 North Spring Street,
Los Angeles, California 90012,

Attorneys for Appellee,
United States of America.

NO. 19861

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FOR THE NINTH CIRCUIT

HUMBERTO COLLAZO,

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Assistant Chief, Criminal Division,
JULES D. BARNETT,
Assistant U. S. Attorney,
Chief, Fraud Section,
Criminal Division,

600 U. S. Court House,
312 North Spring Street,
Los Angeles, California 90012,

Attorneys for Appellee,
United States of America.

TOPICAL INDEX

NO. 19861

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

HUMBERTO COLLAZO,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

I

JURISDICTION AND STATEMENT OF THE CASE

Appellant Humberto Collazo was indicted together with Jesus Marino Rodriguez by a Federal Grand Jury on June 17, 1964, for violation of Title 21, United States Code, Section 176(a), in a one-count indictment charging both defendants with receipt, concealment and facilitating the transportation of marihuana [C. T. 2]. 1/

Defendant Rodriguez pleaded guilty, and is not involved in this appeal [R. T. 69-74]. 2/

1/ Refers to Clerk's Transcript.

2/ Refers to Reporter's Transcript.

On September 18, 1964, after trial by jury, before the Honorable Peirson M. Hall, United States District Judge, a verdict of guilty was returned [C. T. 32].

On October 12, 1964, appellant was sentenced to incarceration for a period of ten years [C. T. 34].

On October 22, 1964, appellant filed a timely notice of appeal.

Jurisdiction of the District Court rested on Title 21, United States Code, Section 176(a), and Title 18, United States Code, Section 3231. This Honorable Court has jurisdiction under Title 28, United States Code, Section 1291 and 1294.

II

STATUTE INVOLVED

Title 21, United States Code, Section 176(a), provides in pertinent part as follows:

> "Notwithstanding any other provision of law, whoever, knowingly, with intent to defraud the United States, imports or brings into the United States marihuana contrary to law, or smuggles or clandestinely introduces into the United States marihuana which should have been invoiced, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of such marihuana after being imported or brought in, knowing

the same to have been imported or brought into the United States contrary to law, or whoever conspires to do any of the foregoing acts, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000. For a second or subsequent offense (as determined under Section 7237(c) of the Internal Revenue Code of 1954), the offender shall be imprisoned for not less than ten or more than forty years and, in addition, may be fined not more than $20,000.

"Whenever on trial for a violation of this subsection, the defendant is shown to have or to have had the marihuana in his possession, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains his possession to the satisfaction of the jury."

III

STATEMENT OF FACTS

On May 26, 1964, appellant bought two first-class tickets on a United Air Lines flight departing Los Angeles at 10:45 P. M., for New York. Joan E. Perkins, ticket agent for United Air Lines specifically recalled the sale of these two tickets (Exhibits No. 4, 5), to the appellant [R. T. 113-118]. Thereafter, on the same day, Thomas Wallin, United Air Lines agent at the los Angeles

International Airport checked Exhibit No. 1 (a green valise), which by stipulation contained marihuana [R. T. 109-113], through to New York for non-appealing co-defendant Rodriguez, and affixed the baggage stub to Exhibit No. 4 (one of the two tickets bought by appellant).

On the same day, United Air Lines agent Wallin checked Exhibits Nos. 2 and 3 (two valises containing marihuana, [R. T. 109-113]), through to New York for appellant [R. T. 121-124]. The baggage checks were affixed to Exhibit No. 5 (one of the tickets purchased by appellant), and the baggage placed on the plane departing for New York.

Lt. Butler of the Los Angeles Police Department then testified as to the search and seizure of Exhibit No. 1, which is not a point in issue in the instant appeal. Sgt. Beckman of the Los Angeles Police Department then testified that he attended the search and seizure of Exhibit No. 1. A full hearing was held by the District Court following a timely motion by counsel for co-defendant Rodriguez, relative to the validity of the search and seizure of Exhibit No. 1, and the motion to suppress was denied. This motion was not joined in by the appellant Collazo [R. T. 25-68].

After the arrest of Rodriguez, Sgt. Beckman called Officer Michael Tobin of the New York Police Department [R. T. 150-151]. Officer Tobin testified that after observing the arrival of the flight upon which Exhibits 2 and 3 were placed, and seeing no one answering the description of appellant, he approached the luggage from the flight, which was subject to immediate claim, in the baggage

room of the United Terminal at Kennedy Airport in New York. He smelled the valises which had not yet been claimed (without touching them), detected the odor of marihuana, and noted the type of combination locks on 2 pieces of luggage, which in his experience was of a type used by persons who transported marihuana. He thereupon opened Exhibits Nos. 2 and 3 and found the marihuana [R. T. 153-157]. The shoes later referred to in this matter were found together with other items of clothing in Exhibits Nos. 2 and 3 [R. T. 157-159]. At that point in the trial the two baggage checks, that had been identified by witness Tobin as having been on Exhibits Nos. 2 and 3 were received in evidence as 2A and 3A [R. T. 164-166]. The numbers on the baggage checks affixed to Exhibits Nos. 2 and 3 and the baggage stubs affixed to Exhibit No. 5 (one of the two tickets bought by appellant), are the same [R. T. 122-124; 164-166].

Mr. Tobin testified that through investigation he ascertained that the shoes found in the luggage had been purchased by appellant.

The shoe salesman, Joseph Leder, verified the connection of appellant to the shoes that had been identified by witness Tobin, by testifying that he specifically recalled the purchase of two pairs of shoes by appellant, including the pair found in the luggage [R. T. 168-172].

During the testimony of appellant in his own behalf, the District Court, at the request of the prosecution, directed the appellant to remove the shoes he was wearing so Mr. Joseph Leder could examine them for the purpose of determining whether or not

the pair of shoes worn by appellant was the other of the two pairs bought by appellant [R. T. 220-221]. On rebuttal, Mr. Leder testified that the pair of shoes worn by the appellant was in fact the other pair bought by the appellant [R. T. 231-232].

ARGUMENT

I

APPELLANT'S CONSTITUTIONAL RIGHTS UNDER THE FOURTH AMENDMENT WERE NOT VIOLATED.

A. Failure to Object in the Trial Court Acts As a Waiver of This Objection.

Appellant on page 21 of his brief refers to a motion to suppress the evidence at issue herein, namely, Exhibits 2 and 3, the suitcases containing marihuana seized in New York. A careful examination of the record reveals no such motion to suppress Exhibits 2 and 3. In fact, the only objections raised to the introduction of this evidence were as to foundation and connection with appellant. Ergo, the appellant, must be considered to waive his motion to suppress. Absent such motion, the receipt into evidence of the questioned exhibits does not constitute "plain error" under Rule 52(b), Federal Rule of Criminal Procedure, but rather is within the discretion of the trial court, as is shown under "B" below.

Jones v. United States, 204 F. 2d 745 (7 Cir. 1953), cert. den. 364 U. S. 854;

Taylor v. Hudspeth, 113 F. 2d 835 (10 Cir. 1940).

B. The Search and Seizure Herein Was Proper.

The facts adduced at trial, consisting of the arrest and seizure relating to non-appealing co-defendant Rodriguez [R. T. 25-68]; the identity of the single purchaser of the two tickets as the appellant [R. T. 115-116, 148]; the strong possibility that the baggage would have been claimed if a delay was encountered [R. T. 153-157]; the identity of the baggage stubs relating to the questioned exhibits [R. T. 130]; the type of combination locks on the luggage; the smell test used by the officer [R. T. 153-157], considered together, establish as reasonable, the action of the officer.

United States v. Dornolut, 261 F. 2d 949 (2 Cir. 1959), cert. den. 360 U. S. 912.

Simply stated, the question here is merely whether or not the arresting officers acted reasonably at the time the seizure was made.

It is accepted that only unreasonable searches and seizures are illegal. That illegality, for the most part, rests on a lack of probable cause or other validating circumstances. The testimony adduced at trial, as more specifically set forth above, showing: the appellant to have purchased the two tickets; the identity of the baggage check stubs on the tickets with the baggage check stubs on the valises containing the marihuana; the type of combination locks

used and the smell test used by the officer, clearly show probable cause.

As further basis for the search that transpired, the actual time-wise situation that existed at the Kennedy International Airport, testified to by Officer Tobin, revealed that at any time the bags could have been claimed by the holder of the baggage checks, or someone acting in his behalf, thereby necessitating immediate action by the officer when faced with this situation.

> Henry v. United States, 361 U.S. 98 (1960);
>
> Brinegar v. United States, 338 U.S. 160 (1949);
>
> United States v. McDaniel, 154 F. Supp. 1, aff'd. 255 F.2d 896, cert. den. 350 U.S. 853;
>
> Davis v. United States, 327 F.2d 301 (9 Cir. 1964);
>
> Cervantes v. United States, 278 F.2d 350 (9 Cir. 1960).

In fact, in the case of Hernandez v. United States, 353 F.2d 624 (9 Cir. 1966), a case that is practically on all fours with the facts herein, this court stated at page 627 and 628:

> "The question remains whether the search of appellant's bags violated the 4th amendment. Sgt. Butler had no warrant. Hence the search was invalid unless made (1) incidental to a lawful arrest, or (2) in 'exceptional circumstances -- in this case, that contraband was threatened with imminent removal or destruction. (citations) We hold that the search

was not incident to appellant's subsequent arrest . . . but rather, because the search was in fact independent of the arrest. . . . These elements, taken together with the use of Ventura combination-lock suitcases, payment in bills of large demonination and the apparent Latin-American derivation of the passenger . . . illuminated by Sgt. Butler's past experience they furnished reasonable grounds for him to believe . . . that appellant's suitcases contained marijuana,' and finally the court points out (as in the present case), 'The circumstances upon which Sgt. Butler relied were within his knowledge before the search was initiated, and were sufficient to justify a reasonable man in believing that the very bags which Sgt. Butler searched did in fact contain marijuana.' " (Emphasis added).

II

POSSESSION OF MARIHUANA WAS CLEARLY ESTABLISHED.

The facts as spelled out herein showing possession, ownership and control of the marihuana by appellant clearly satisfy the provisions of Title 21, United States Code, Section 174, as needed to invoke the presumption of guilty knowledge [R. T. 141-143, 154, 157-158, 160, 164, 170-172].

Clearly the possession spelled out by the testimony comes within the rule set forth in Hernandez v. United States, 300 F. 2d 114 (9 Cir. 1962), where this court stated at page 117:

> "We have not hesitated to uphold convictions under Section 174 wherever either actual or constructive possession could be honestly, fairly and conscientiously inferred."

Rodella v. United States, 286 F. 2d 306 (9 Cir. 1960);

Modrano v. United States, 315 F. 2d 361 (9 Cir. 1963);

Brothers v. United States, 328 F. 2d 151 (9 Cir. 1964).

III

THE DISTRICT COURT DID NOT ERR IN REQUIRING REMOVAL AND EXAMINATION OF APPELLANT'S SHOES.

A. It is well established that when a defendant takes the stand in his own defense he waives his right of privilege against self-incrimination. This applies particularly where the testimony sought relates to appellant's direct testimony, which was the case here [R. T. 208, 215-216].

Ruffel v. United States, 271 U. S. 494 (1926);

United States v. Provoo, 215 F.2d 531 (2 Cir. 1954), aff'd. 350 U.S. 857 (1955).

B. In any event inspection of defendant's body, or his apparel, as physical evidence, is never privileged.

Holt v. United States, 218 U.S. 245 (1910);

164 A.L.R. 952;

Smith v. United States, 187 F.2d 192 (D.C. Cir. 1950);

See also:

People v. Haeussler, 41 Cal. 2d 252 (1953);

People v. Clark, 18 Cal. 2d 449 (1941).

CONCLUSION

For the reasons above submitted, it is respectfully requested that the appeal be denied and the judgment below affirmed.

Respectfully submitted,

MANUEL L. REAL,
United States Attorney,

JOHN K. VAN DE KAMP,
Assistant U. S. Attorney,
Chief, Criminal Division,

ROBERT L. BROSIO,
Assistant U. S. Attorney,
Assistant Chief, Criminal Division,

JULES D. BARNETT,
Assistant U. S. Attorney,
Chief, Fraud Section,
Criminal Division,

Attorneys for Appellee,
United States of America.

CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Jules D. Barnett
JULES D. BARNETT